86-857

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

ROMESH GULATI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

EDMUND W. BURKE
RICHARD J. SCHREIBER
RICHARD V. WICKA
BURLINGTON NORTHERN
RAILROAD COMPANY
3800 Continental Plaza
Ft. Worth, TX 76102

REX E. LEE *
RONALD S. FLAGG
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the Minnesota Supreme Court erred in holding that a claim for intentional infliction of emotional distress is actionable under state law where the alleged source of the emotional injuries was workplace disputes with supervisors and co-workers subject to mandatory grievance procedures under the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.*

2. Whether the Minnesota Supreme Court erred in holding that such a state law claim is not preempted by the Federal Employers' Liability Act, 45 U.S.C. §§ 51, *et seq.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No.

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

ROMESH GULATI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

Burlington Northern Railroad Company [1] hereby petitions for a writ of certiorari to review the decision of the Minnesota Supreme Court in this case.

OPINIONS BELOW

The decision of the Minnesota Supreme Court (App., *infra*, 1a-27a) is reported at 390 N.W.2d 743 (1986). The decision of the Minnesota Court of Appeals (App., *infra*, 29a-37a) is reported at 364 N.W.2d 446 (1985). The decision of the Hennepin County District Court (App., *infra*, 40a-43a) is not reported.

---

[1] The corporations which require disclosure pursuant to Rule 28.1 of this Court's Rules are listed, App., *infra*, 50a-52a.

JURISDICTION

The judgment of the Minnesota Supreme Court was entered on August 1, 1986. The order of that court denying Burlington Northern's petition for rehearing was entered on August 29, 1986 (App., *infra*, 44a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). See *Southland Corp.* v. *Keating*, 465 U.S. 1, 6-7 (1984); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 482-83 (1975).

STATUTES INVOLVED

Title I, Section 2 of the Railway Labor Act ("RLA") 45 U.S.C. § 151a, provides in pertinent part:

> "The purposes of the Chapter are: (1) To avoid any inteterruption to commerce or to the operation of any carrier engaged therein . . . (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions."

Title I, Section 2 of the RLA, 45 U.S.C. § 152, provides in pertinent part:

> "*First. Duty of carriers and employees to settle disputes.* It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."
>
> "*Second. Consideration of disputes by representatives.* All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized

so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute." [2]

Section 1 of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, provides in pertinent part:

> "Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

STATEMENT

1. Petitioner, Burlington Northern, is a common carrier by rail operating in the western United States. Respondent, Romesh Gulati, was hired as a machinist in 1967. App., *infra*, 4a.

A collective bargaining agreement (the "Agreement") entered into pursuant to the RLA governs the relationship between members of the Machinists Union, including respondent, and Burlington Northern. Rule 34 of the Agreement provides a detailed mechanism whereby an aggrieved employee, with or without the assistance of his union representatives, can initiate and prosecute a grievance through successive levels of appeal, up to and including mutually binding arbitration before a National Railroad Adjustment Board ("NRAB") (App., *infra*, 46a-48a).[3] Under Rule 35 of the Agreement, employees

---

[2] The text of 45 U.S.C. § 153 First (i), setting forth the procedures applicable to resolution of grievances under the RLA, is provided in App., *infra*, 45a.

[3] Under Sections 2(5) and 3 First of the RLA "all disputes . . . growing out of grievances or out of the interpretation or applica-

may be disciplined, following investigation, for violation of petitioner's rules including those set forth in petitioner's Safety Rules, which govern the conduct of supervisors and other employees. *Id.* at 48a-49a.

In 1975, respondent injured his hand during the course of his employment with petitioner (App., *infra*, 5a). He brought suit on September 21, 1977 under the FELA to recover damages for lost wages and permanent disability of his hand. *Id.* Petitioner settled respondent's FELA suit on March 10, 1980, agreeing to pay respondent $47,250 and to allow him to continue working as a machinist for the railroad company. *Id.*

Respondent's claims in this case arise out of a series of incidents commencing after that settlement. On July 31, 1980, petitioner sent respondent a notice that the company was investigating him for allegedly falsifying a time card (App., *infra*, 5a). Pursuant to Rule 35 of the Agreement, respondent was requested to appear at a hearing concerning this charge, at which he maintained that a fellow employee had altered the time card. *Id.* Following the investigation, petitioner dropped the charge against respondent. *Id.*

On August 4, 1980, Burlington Northern sent another notice to respondent, alleging that he had been involved in an altercation during work hours (App., *infra*, 5a).

---

tion of agreements concerning rates of pay, rules or working conditions" must be submitted to federally constituted arbitration panels up to the level of the NRAB. 45 U.S.C. §§ 151a(5), 153 First. Section 3 First's mandatory and exclusive procedures govern a vast number of employee grievances annually—by recent estimate over 180,000 grievances among major carriers in the railroad industry alone. *See Amicus* Brief for Association of American Railroads and National Association of Railroad Trial Counsel at 7 & n.6, *Atchison, T. & S. F. Ry.* v. *Buell*, No. 85-1140 (petition granted May 5, 1986) (more than 183,800 grievances handled annually by "chief operating officer . . . designated to handle such disputes" at 12 major carriers).

Again, following an investigatory hearing held pursuant to Rule 35, petitioner dropped the disciplinary charge against respondent.

On September 5, 1980, petitioner notified respondent that the company was investigating him for leaving work one day without proper authorization in violation of petitioner's Safety Rules (App., *infra*, 6a). After a hearing pursuant to Rule 35, the railroad discharged respondent for his unexcused absence. *Id.* Respondent appealed this decision to the NRAB, Public Law Board 3008, which denied respondent's claim and upheld his dismissal. *Id.*

Respondent alleges that, between the time of the settlement agreement in March, 1980 and his discharge in October, 1980, he was subject to other acts which contributed to his emotional distress. Among other things, he alleges he was under extraordinary scrutiny by his supervisors, that he was the target of ethnic slurs and derogatory names by his supervisors, that his private locker was ransacked, and that epithets written about him in the men's room were not removed despite his protests (App., *infra*, 41a).[4]

2. Rather than seek relief for this alleged misconduct through the administrative machinery created by Section 3 First of the RLA, respondent filed suit against Burlington Northern in Hennepin County District Court on April 12, 1982 (App., *infra*, 6a). He alleged three causes of action: (1) that petitioner breached the 1980 settlement of his FELA claim; (2) that the company wrongfully discharged him; and (3) that petitioner inflicted emotional distress on him through a pattern of

---

[4] Six months after his discharge from Burlington Northern on March 30, 1981, respondent suffered a heart attack (App., *infra*, 6a). After his discharge, respondent also began consulting a psychiatrist. *Id.*

harassment.[5] *Id.* Burlington Northern moved to dismiss the complaint on the ground that RLA's procedures for resolving grievances provided the exclusive remedy for respondent's claims.

The district court granted the railroad's motion on two of respondent's claims, concluding that the wrongful discharge and breach-of-contract claims were preempted by the RLA (App., *infra*, 40a-43a). The court, however, denied the railroad's motion to dismiss the claim of intentional infliction of emotional distress. *Id.* The court held that because "the alleged tortious conduct occurred over a long period of time and it hardly could be considered a normal incident of employment . . . state judicial supervision would not interfere with a federal regulatory scheme [i.e., the RLA]." *Id.* at 42a.

Burlington Northern petitioned the court to certify the preemption question to the Minnesota Court of Appeals under Rule 103.03(h) of the Minnesota Rules of Civil Appellate Procedure. The district court granted the motion and certified the question: "Does the Railway Labor Act and/or the Federal Employer's Liability Act pre-empt state court jurisdiction over plaintiff's claim of intentional infliction of emotional distress?" (App., *infra*, 39a).

3. In a decision entered March 12, 1985, the court of appeals held that, although the RLA preempts a claim of infliction of emotional distress where the distress results from a discharge by a railroad, neither the RLA nor the FELA preempts such a claim where the emotional distress results from a pattern of employer harassment (App., *infra*, 29a-37a). In so holding the court reasoned (*id.* at 36a):

---

[5] Respondent also filed a separate lawsuit based on the same facts under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, in federal court. *Gulati* v. *Burlington Northern, Inc.*, Civ. 3-82-679 (D. Minn.).

> "[I]n an action for intentional infliction of emotional distress, there will be no need to interfere with the jurisdiction of the RLA because the charges did not result in discipline. Rather, the focus of the state inquiry will be whether the unfounded charge against Gulati and investigations that appear in a category not envisioned by the collective bargaining agreement were brought to intimidate him, thereby inflicting emotional distress."

4. The Minnesota Supreme Court granted Burlington Northern's petition for further review of the certified question on May 24, 1985. In a decision entered August 1, 1986, the court answered the question in the negative (App., *infra*, 1a-27a).

First, the court considered whether the mandatory grievance procedures set forth by the RLA preempted respondent's claim for intentional infliction of emotional distress. The court acknowledged that under decisions of this Court, as well as several other courts, actions brought under state law are preempted where the labor-management disputes are minor disputes[6] subject to RLA-mandated grievance procedures provided in collective bargaining agreements. *Id.* at 13a, *citing Andrews* v. *Louisville & N.R.R.*, 406 U.S. 320 (1972); *Jackson* v. *Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *Choate* v. *Louisville & N.R.R.*, 715 F.2d 369 (7th Cir. 1983); *Magnuson* v. *Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.),

---

[6] As this Court explained in *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 723 (1945), the RLA divides labor disputes into two categories: the first, "major disputes," relates to "the formation of collective agreements or efforts to secure them," and the second, "minor disputes," relates to the interpretation of a collective bargaining agreement or "disputes founded upon some incident of the employment relation." Under the RLA, major disputes are subject to the exclusive jurisdiction of the National Mediation Board (45 U.S.C. § 154), while minor disputes are subject to the exclusive jurisdiction of the National Railroad Adjustment Board ("NRAB") (45 U.S.C. § 158). 325 U.S. at 722.

cert. denied, 439 U.S. 930 (1978). However, the Court found that allegations of a "pattern of harassment" do not constitute a minor dispute and thus distinguished this case from the above-cited decisions (App., *infra*, 13a-14a):

> "Unlike a claim of wrongful discharge, a claim of intentional infliction of emotional distress where the distress results from a continual pattern of harassment is not a minor dispute under the RLA. Such a claim does not 'stem from differing interpretations of the collective-bargaining agreement,' *Andrews*, 406 U.S. at 324, but rather is premised on the tort-law principle that citizens of our state must be protected from conduct 'so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community.' *Haagenson* v. *National Farmers Union Property and Casualty Co.*, 277 N.W. 2d 648, 652 n.3 (Minn. 1979) (citing the Restatement (Second) of Torts § 46, Comment d (1965)). The conduct that . . . Gulati allege[s] transcends the four corners of the collective-bargaining agreement Burlington Northern entered into with its employees. The alleged behavior, if proven, will constitute a continual pattern of harassment on the part of Burlington Northern, conduct that is not merely a wrongful-discharge claim or other grievance premised on a collective-bargaining agreement."

In support of its conclusion, the court also cited the decision in *Farmer* v. *United Brotherhood of Carpenters & Joiners of America, Local 25*, 430 U.S. 290 (1977), in which this Court held that the National Labor Relations Act ("NLRA") did not preempt a union member's state law claim of intentional infliction of emotional distress (App., *infra*, 16a-17a). The Minnesota Supreme Court relied on *Farmer* in concluding that its "recognition of a state remedy for the intentional infliction of emotional distress in this case would not frustrate the collective-bargaining process of the RLA." *Id.* at 18a.

Second, the court considered whether respondent's action was preempted by the FELA. The court held that "[a]n examination of federal case law . . . reveals that recovery for intentional acts under the FELA is limited to intentional torts that cause *physical* injury" (App., *infra*, 21a, emphasis in original).[7] By contrast, "to recover for the intentional infliction of emotional distress, a plaintiff need not establish any physical injury." *Id.* The court recognized "that some potential for interference may be present when a railway employee sues in state court for intentional infliction of emotional distress" because the "enactment of a federal compensatory scheme implies that Congress did not intend for interstate commerce to be hampered by different state systems of compensation" (App., *infra*, 24a). Nonetheless, the Court concluded that "such interference . . . is minimized where emotional harm is alleged to have resulted from a continual pattern of intentional acts. The claim of intentional infliction of emotional distress lies outside the scope of the federal statute, which was enacted to compensate only physical injuries resulting from negligence." *Id.*

REASONS FOR GRANTING THE WRIT

The decision of the Minnesota Supreme Court permits railroad employees with grievances concerning working conditions to evade, by means of artful pleading under state tort law, grievance procedures explicitly provided by the RLA as the exclusive means of resolving such disputes. The decision is only one among a wave of recent state court decisions that have permitted such an evasion.[8]

---

[7] The court acknowledged (*id.*) that its holding on this point conflicts with the Ninth Circuit's decision in *Buell* v. *Atchison, T. & S. F. Ry.*, 771 F.2d 1320 (9th Cir. 1985), *cert. granted*, 106 S. Ct. 1946 (1986).

[8] *See, e.g., DeTomaso* v. *Pan American World Airways, Inc.*, 174 Cal. App.3d 1170 (Cal. App. 1985), *appeal pending*, 714 P.2d 1239

The Minnesota court's opinion conflicts with the decisions of this Court and those of the courts of appeals for several circuits which have made clear that Congress intended the grievance provisions of the RLA to be interpreted broadly in order to facilitate the "prompt and orderly settlements of *all* disputes growing out of grievances" in the railroad industry. 45 U.S.C. § 151a(5) (emphasis supplied). Consistent with this principle, the recent decisions of the courts of appeals in at least four circuits have held that a cause of action for intentional infliction of emotional distress is preempted by the RLA, precisely because a contrary interpretation—such as that of the Minnesota Supreme Court—invites litigants to avoid the grievance resolution mechanism required by the RLA. The Minnesota Supreme Court's decision—as well as the other state court decisions cited *supra*—also conflict with decisions of this Court and the court of appeals for several circuits holding that the liability of any interstate railway carrier for injuries to its employees is governed *exclusively* by the provisions of the FELA.

The issues raised by the Minnesota Supreme Court's decision, which affect railroad employees throughout the country, are arising with increasing frequency, and have resulted in several recent inconsistent decisions—one of which is presently pending before this Court for resolution on the merits. In *The Atchison, T. and S. F. Ry.* v. *Buell*, No. 85-1140, the issues are whether an alleged pattern of harassment by a railroad supervisor constitutes a minor dispute under the RLA and whether a claim solely for emotional distress is cognizable under the FELA.[9]

(1986); *Hanson* v. *City of Tacoma*, 719 P.2d 104 (Wash. 1986); *Puchert* v. *Agsalud*, 677 P.2d 449 (Hawaii 1984), *appeal dismissed sub nom. Pan American World Airways, Inc.* v. *Puchert*, 105 S. Ct. 2693 (1985); *Trombetta* v. *Detroit, Toledo & Ironton R.R.*, 265 N.W.2d 385 (Mich. App. 1978).

[9] In *Buell*, the Ninth Circuit held that a claim for emotional distress was actionable under the FELA, even where the alleged

We believe that the Court should either hold this case pending a decision in *Buell* or review this case as well. A decision in *Buell* concerning the scope of minor disputes under the RLA could control the issue in this case concerning the applicability of the RLA to claims of a pattern of harassment. Similarly, a decision in *Buell* resolving whether claims solely for emotional distress are cognizable under the FELA would obviously apply in this case as well. However, this case differs from *Buell* in that here the railway employee has alleged intentional infliction of emotional distress under state law, and thus this case involves the issue of whether the RLA preempts a state tort cause of action. By contrast, the claims in *Buell* have been raised under the FELA and, thus, in that case the Court must attempt to accommodate the policies of two federal statutes. Accordingly, the growing conflict over whether state tort remedies are preempted by the RLA might not be definitively resolved unless this case is also reviewed.

1. Railroad employee disputes are governed by the RLA, 45 U.S.C. § 151 *et seq.* The Act states that one of its general purposes is "to provide for the prompt and

---

source of such injuries was a workplace dispute subject to the mandatory grievance procedures that had been initiated pursuant to the RLA. By contrast, in numerous other cases, courts have held that claims for emotional distress (whether brought under the FELA or state tort law) arising from workplace disputes are directly related to the employer-employee relationship and thus must be resolved pursuant to the grievance procedures required by the RLA. *See, e.g., Adkins* v. *Chesapeake and Ohio Ry.*, No. 85-1204 (4th Cir., Oct. 3, 1985) (unpublished order), *petition for cert. pending*, No. 85-1099; *Antalek* v. *Norfolk and W. Ry.*, No. 84-3057 (6th Cir., Aug. 30, 1984) (unpublished order); *Beers* v. *Southern Pacific Transp. Co.*, 703 F.2d 425, 428-29 (9th Cir. 1983); *Magnuson* v. *Burlington Northern, Inc.*, 576 F.2d at 1368-70; *Jackson* v. *Consolidated Rail Corp.*, 717 F.2d at 1048-54; *Choate* v. *Louisville & N.R.R.*, 715 F.2d at 370-72; *Koehler* v. *Illinois Ceneral Gulf R.R.*, 109 Ill.2d 473, 488 N.E.2d 542, 545-46 (Ill. 1985), *cert. denied*, 106 S. Ct. 3297 (1986).

orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions. 45 U.S.C. § 151a(5). So-called "minor disputes" are those which involve either the meaning or application of the collective bargaining agreement or an employment dispute not covered by the agreement. *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 723 (1945). The fact that they are labelled "minor" disputes does not mean they are unimportant. Rather, "minor disputes" cover the broad range of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions. *Union Pacific R.R.* v. *Sheehan*, 439 U.S. 89, 94 (1978).

This Court has made clear that, consistent with the RLA, 45 U.S.C. § 153 First (i), minor disputes must be submitted to the NRAB, which has exclusive jurisdiction to resolve them. *Andrews* v. *Louisville & N.R.R.* 406 U.S. 320, 322, 325 (1972). As this Court stated in *Brotherhood of Locomotive Eng'rs* v. *Louisville & N.R.R.*, 373 U.S. 33, 38-39 (1963), the grievance procedures provided under the RLA constitute "a mandatory, exclusive and comprehensive system for resolving grievance disputes . . . [and] were intended by Congress to be the complete and final means for settling minor disputes." See also *Union Pacific R. Co.* v. *Sheehan*, *supra*, 439 U.S. at 94.

Congress has also made clear that the scope of RLA is not to be interpreted narrowly. The purpose of the RLA, Congress declared, is "to provide for the prompt and orderly settlement of *all* disputes growing out of grievances *or* out of the interpretation or application of agreements covering rates of pay, rules or working conditions" (emphasis supplied). 45 U.S.C. § 151a(5). Consistent with Congress' mandate, courts have broadly construed the RLA's coverage. Thus, this Court has held that "disputes" under the RLA include claims "founded

upon some incident of the employment relation . . . independent of those covered by the collective agreement." *Elgin, J. & E.R. Co.* v. *Burley, supra,* 325 U.S. at 723.

The Minnesota Supreme Court's decision in this case is premised on the theory that Congress did not mean what it said in drafting the RLA and that this Court erred in interpreting the Act in *Burley* (App., *infra,* 13a-14a). Contrary to the plain language of the statute and this Court's decision, the state court held that the scope of the grievance procedures mandated by the RLA is strictly limited to controversies arising under "the four corners of the collective bargaining agreement." *Id.* at 14a.[10]

This conclusion conflicts directly with the decisions that have followed *Burley* in holding that *all* grievances arising out of the employment relationship—whether contractually based or not—are minor disputes under the RLA.[11] Similarly, other courts—faithful to the mandate to interpret the scope of the RLA broadly—have held that rail-

---

[10] This is also the key legal conclusion underlying the Ninth Circuit's decision in *Buell* as well as the central argument advanced by respondent in that case before this Court.

[11] *See, e.g., Pennsylvania R.R.* v. *Day,* 360 U.S. 548, 551-52 (1959) (The NRAB "was established as a tribunal to settle disputes arising out of the relationship between carrier and employee" and "[t]he purpose of the Act is fulfilled if the claim itself arises out of the employment relationship which Congress regulated"); *Detroit and T. Shore Line R.R.* v. *United Transp. Union,* 396 U.S. 142, 159 (1969) (Harlan, J. dissenting) (Railroad collective bargaining agreements include only a small portion of the rules governing day-to-day working conditions because "[w]here a condition is satisfactorily tolerable to both sides it is often omitted from the agreement, and . . . this practice is more frequent in the railroad industry than most others"); *Railway Labor Executives Ass'n* v. *Atchison, T. and S.F. Ry.,* 430 F.2d 994, 996 (9th Cir. 1970), *cert. denied,* 400 U.S. 1021 (1971); *Missouri-Kan.-Tex. R.R.* v. *Brotherhood of Railroad Trainmen,* 342 F.2d 298, 300 (5th Cir. 1965); *Illinois Central R.R.* v. *Brotherhood of Locomotive Firemen and Enginemen,* 332 F.2d 850, 853-54 (7th Cir.), *cert. denied,* 379 U.S. 932 (1964).

road employee claims of intentional infliction of emotional distress,[12] retaliatory discharge,[13] and slander[14] all constitute disputes subject to RLA grievance procedures. For example in *Beers* v. *Southern Pacific Transp. Co., supra*, the plaintiff alleged a pattern of harassment relating to working conditions and disciplinary procedures as part of a complaint under state law for intentional infliction of emotional distress. The Ninth Circuit held that plaintiff's claim was preempted by the RLA, holding (703 F.2d at 428) (quoting *Magnuson*, 576 F.2d at 1361):

> "If the pleading of emotional injury permitted aggrieved employees to avoid the impact of the R.L.A., the congressional purpose of providing a comprehensive federal scheme for the settlement of employer-employee disputes in the railroad industry, without resort of the courts would be thwarted."

Read collectively, these cases make clear that it is the source of a railroad employee's alleged injury, and not the remedy which he might prefer to pursue, that determines whether a dispute is subject to the RLA.

Respondent's allegations concerning his treatment by his supervisors place this case right at the core of RLA coverage. This is a classic employer-employee dispute

---

[12] *See, e.g., Adkins* v. *Chesapeake & O. Ry.*, No. 85-1204 (4th Cir., Oct. 3, 1985); *Antalek* v. *Norfolk and Western Ry.*, No. 84-3057 (6th Cir., Aug. 30, 1984); *Choate* v. *Louisville & N.R.R.*, 715 F.2d 369 (7th Cir. 1983); *Beers* v. *Southern Pacific Transp. Co.*, 703 F.2d 425 (9th Cir. 1983); *Magnuson* v. *Burlington Northern, Inc.*, 576 F.2d 1367, 1369 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978).

[13] *See, e.g., Minehart* v. *Louisville & N.R.R.*, 731 F.2d 342 (6th Cir. 1984); *Landfried* v. *Terminal Railroad Ass'n of St. Louis*, 721 F.2d 254 (8th Cir. 1983), *cert. denied*, 466 U.S. 928 (1984); *Jackson* v. *Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984).

[14] *See, e.g., Fraley* v. *Hayes*, 112 BNA LRRM 2298 (S.D. Ill. 1982); *Carson* v. *Southern Ry.*, 494 F. Supp. 1104 (D.S.C. 1979).

arising out of working conditions in the shop and events that occurred there. The heart of the pattern of harassment alleged by respondent were three disciplinary hearings initiated by his employer pursuant to Rule 35 of the collective bargaining agreement, the last of which resulted in respondent's discharge. If respondent believed he was being unfairly or improperly treated as a result of these hearings and related actions by his supervisor, the mandatory grievance procedures set forth in Rule 34 of the Agreement were plainly available to him. The courts of appeals for several circuits have repeatedly held that railway labor disputes which are "inextricably intertwined with the grievance machinery of the collective bargaining agreement" or are "arguably governed" by the collective bargaining agreement or which have a "not obviously insubstantial" relationship to it are minor disputes subject to RLA grievance procedures. *See, e.g., Magnuson* v. *Burlington Northern, Inc.*, 576 F.2d at 1369-70 (and cases cited therein).[15]

The overly-narrow interpretation of the RLA applied by the Minnesota Supreme Court in this case—which permits a plaintiff to evade the grievance procedures mandated by that Act simply by alleging emotional dis-

---

[15] This Court has emphasized that the scope of collective bargaining agreements in the railroad industry is to be very broadly construed:

> "A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts . . . . '[I]t is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate . . . .' The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant."

Transportation-Communication Employees Union v. *Union Pacific R.R.*, 385 U.S. 157, 160-61 (1966), *quoting United Steelworkers of America* v. *Warrior and Gulf Nav. Co.*, 363 U.S. 574, 578-79 (1960).

tress—conflicts in principle with these decisions as well as with congressional railway labor policy.[16]

2. The Minnesota Supreme Court's decision that a claim for injury under state tort law is not preempted by the FELA, also is in conflict with decisions of this Court and the courts of appeals for several circuits. The FELA is a safety statute which creates a tort remedy for railroad workers injured on the job. The statute's main purpose was to provide incentives for the creation of a safer workplace by eliminating a number of traditional defenses to tort liability, including contributory negligence, contractual waiver of liability, the fellow-servant rule, and assumption or risk. See 45 U.S.C. §§ 51, 53-55; H.R. Rep. No. 1386, 60th Cong., 1st Sess. (1908). Under the FELA, each party receives a benefit in exchange for a limitation of its rights. Employees are

---

[16] The Minnesota Supreme Court's holding that this Court's decision in *Farmer*, permits respondent to bypass the mandatory grievance procedures of the RLA conflicts with the decisions of numerous federal and state courts which have declined to apply the *Farmer* rationale to claims subject to RLA grievance procedures. *See, e.g., Peterson* v. *Air Line Pilots Ass'n Int'l*, 759 F.2d 1161, 1168-69 and n.18 (4th Cir.), *cert. denied*, 106 S. Ct. 312 (1985); *Jackson* v. *Consolidated Rail Corp.*, 717 F.2d 1045, 1051-54 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *Magnuson* v. *Burlington Northern, Inc.*, 576 F.2d 1367, 1369-70 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978); *Koehler* v. *Illinois Central Gulf R.R.*, 109 Ill. 2d 473, 488 N.E.2d 542, 545 (1985), *cert. denied*, 106 S. Ct. 3297 (1986). The principle underlying these decisions is that "the *Farmer* exemption to preemption, by its terms, applies to the preemptive effect of the National Labor Relations Act, *not* to the RLA." *Koehler*, 488 N.E.2d at 545 (emphasis supplied). Unlike the RLA, the NRLA does not expressly establish an exclusive remedial scheme. As this Court has recognized, "since the compulsory character of the administrative remedy provided by the Railway Labor Act . . . stems not from any contractual undertaking between the parties but from the Act itself, the case for insisting on resort to those remedies is if anything stronger in cases arising under the Act than it is in cases arising under § 301 of the LMRA." *Andrews* v. *Louisville & N.R.R.*, 406 U.S. 320, 323 (1972).

given a much lower threshold of liability, *Heater* v. *Chesapeake and Ohio Ry.*, 497 F.2d 1243, 1246 (7th Cir.), *cert. denied*, 419 U.S. 1013 (1974), but they give up non-federal causes of action. *New York Central R.R.* v. *Winfield*, 244 U.S. 147 (1917); *New York Central & Hudson R.R.* v. *Tonsellito*, 244 U.S. 360 (1917); *Anderson* v. *Burlington Northern, Inc.*, 469 F.2d 288 (10th Cir. 1972) (state common law loss of consortium claim by widow of railroad employee preempted by FELA). Employers lose various defenses, but gain an exclusive remedy. In sum, railway employees, such as respondent, are entitled *only* to relief afforded under the FELA, even if that is different from the relief formerly available under state law.

It has long been held that the liability of any interstate railway carrier for injuries to its employees is governed entirely and exclusively by the provisions of the FELA. In *New York Central R.R.* v. *Winfield*, the employee suffered an injury when he struck a pebble which richocheted into his eye. It was conceded that the incident occurred without fault on the part of the employer, so FELA did not provide a remedy. When the employee tried to collect compensation under the state workers' compensation law, this Court held that FELA was comprehensive and exclusive, and precluded compensation under state law. Likewise, in *New York Central & Hudson R.R.* v. *Tonsellito*, this Court held that a state common law claim was precluded by FELA because Congress had fixed railroads' liability, and "such liability can neither be extended nor abridged by common or statutory laws of the State." 244 U.S. at 362. Consistent with those holdings the court in *Janelle* v. *Seaboard Coast Line R.R.*, 524 F.2d 1259, 1261 (5th Cir. 1975) made clear that the FELA supplants state tort remedies:

> "It has been settled law for over sixty years that damages for the death or injury of a railroad employee engaged in interstate commerce, allegedly

caused by the negligence of the railroad, are recoverable exclusively from the railroad under FELA, and may not be recovered under state law. *Mondou* v. *New York, New Haven and Hartford Railroad Co.* (Second Employers' Liability Cases), 1912, 223 U.S. 1, 32 S. Ct. 169, 56 L.Ed. 327; *Louisiana and Arkansas Ry. Co.* v. *Pratt*, 5 Cir. 1944, 142 F.2d 847; *Jess* v. *Great Northern Railway Co.*, 9 Cir. 1968, 401 F.2d 535; *Anderson* v. *Burlington Northern, Inc.*, 10 Cir. 1972, 469 F.2d 288."

The decision of the Minnesota Supreme Court directly conflicts wtih these decisions and with the rationale supporting preemption of state tort action: the FELA applies to railroad workers throughout the United States and only through uniform rules may litigants receive similar treatment in all states as Congress intended in enacting that statute. *Brady* v. *Southern Ry.*, 320 U.S. 476, 479 (1943). The Minnesota Supreme Court's ruling that state tort law is not preempted by the FELA would destroy the uniform federal scheme and permit litigants in one state to enjoy rights dramatically different from those in other states. Thus, unless that court's decision is reviewed, the established mechanisms for resolving claims for injury in the railroad industry would be circumvented by allegations of intentional infliction of emotional distress.

CONCLUSION

The petition for a writ of certiorari to review the judgment of the Minnesota Supreme Court should be granted. Alternatively, the Court may wish to consider retaining this case on its docket pending decision on the merits in *Buell*.

Respectfully submitted,

EDMUND W. BURKE
RICHARD J. SCHREIBER
RICHARD V. WICKA
BURLINGTON NORTHERN
RAILROAD COMPANY
3800 Continental Plaza
Ft. Worth, TX 76102

REX E. LEE *
RONALD S. FLAGG
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

* Counsel of Record

APPENDICES

APPENDIX A

STATE OF MINNESOTA
IN SUPREME COURT

C7-84-1333, C4-85-1431

Hennepin County — Scott, J.
Kelley, J., dissenting

C4-85-1431

VIRGINIA PIKOP,
Appellant,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,
Respondent,

CLARENCE PATTERSON, *et al.*,
Defendants.

and

C7-84-1333

ROMESH GULATI,
Respondent,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY, PETITIONER,
Appellant.

Filed August 1, 1986
Wayne Tschimperle
Clerk of Appellate Courts

SYLLABUS

The Railway Labor Act, 45 U.S.C. §§ 151-63 (1982), and the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1982), do not preempt a railway employee's state-law claim of intentional infliction of emotional distress where the alleged distress results not from a wrongful discharge, but from a continual pattern of harassment on the part of the railroad-employer.

Judgment reversed as to C4-85-1431; certified questions answered in the negative as to C7-84-1333.

Considered and decided by the court en banc without oral argument (C4-85-1431); heard, considered, and decided by the court en banc (C7-84-1333).

OPINION

SCOTT, Justice.

Virginia Pikop and Romesh Gulati are former employees of Burlington Northern Railroad Company (Burlington Northern), who individually filed suit against the railroad in state court, claiming intentional infliction of emotional distress. Burlington Northern contends that both suits are preempted by the Railway Labor Act (RLA), 45 U.S.C. §§ 151-63 (1982), and/or the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60 (1982). We conclude that the two federal acts do not preempt state-court jurisdiction over a former railway employee's claim of intentional infliction of emotional distress where the alleged distress results from a continual pattern of harassment on the part of the railroad-employer. We therefore remand the two cases for trial in the respective district courts.

Pikop's claim.

From September 24 to November 25, 1981, Virginia Pikop was employed by Burlington Northern as a seasonal section-crew worker. At various times during this

period, her direct supervisor allegedly forced her into his vehicle and coerced her, through threats and promises relating to her employment, to perform sexual acts against her will. Despite her complaints to Burlington Northern officials, Pikop's supervisor allegedly continued to sexually assault her, a pattern that allegedly persisted even after she was no longer employed by the railroad.

During the two months in which she was employed at Burlington Northern, Pikop was allegedly subject to continual harassment by co-employees, who repeatedly called her "pig," "bitch," and "cunt." Several employees allegedly assaulted Pikop during working hours.

As a section-crew worker, Pikop was employed in railroad yards, where she often had contact with employees of the railroad's pest control program. Pikop alleges that these employees constantly threatened her with rat carcasses, repeatedly forced her to watch them torture and mutilate rats and birds, and occasionally coerced her to participate in the mutilation and torture. She maintains that railroad supervisors allowed this conduct on the part of her co-employees to take place repeatedly.

After Pikop was furloughed from her seasonal position with Burlington Northern, she sought psychiatric counseling. She claims that as a result of the alleged harassment and outrageous conduct on the part of the railroad and its employees, she has suffered serious and permanent emotional injuries.

Pikop first brought suit against Burlington Northern and four individual employees in Hennepin County District Court on November 17, 1982, alleging, *inter alia*, the intentional infliction of emotional distress. In its answer, Burlington Northern argued that the exclusive remedy for Pikop's claims was the FELA. As a result, Pikop voluntarily dismissed, without prejudice, the complaint she filed in state court and brought suit against the railroad and the individual employees in federal dis-

trict court on December 21, 1982. In addition to her FELA claim, Pikop sought to recover damages under state-law claims of assault, battery, false imprisonment, and intentional infliction of emotional distress.

In federal court, Burlington Northern moved for summary judgment. The court granted Burlington Northern's motion on Pikop's claim of intentional infliction of emotional distress, ruling that Pikop's exclusive remedy against the railroad was under the FELA and that the FELA did not recognize an independent cause of action for the intentional infliction of emotional distress.[1] The court allowed those claims that were actionable under the FELA to go to trial.

On March 18, 1985, Pikop brought suit against the railroad and three individual railway employees in Hennepin County District Court, alleging, *inter alia*, the intentional infliction of emotional distress.[2] Thereafter, Burlington Northern moved to have Pikop's claim against it dismissed. On July 11, 1985, the district court ordered entry of judgment in favor of the railroad, ruling that Pikop's claim was preempted by the FELA. Pikop appealed to the court of appeals. Burlington Northern petitioned this court for an accelerated review. We granted the petition on December 13, 1985, and now reverse the district court.

Gulati's claim.

In 1967, Romesh Gulati was hired as a Machinist Federal Inspector for Burlington Northern Railroad. In

---

[1] The federal court also ruled that it would not invoke pendent-party jurisdiction over Pikop's claims against the individual employees, claims that included assault, battery, false imprisonment, negligence, and intentional infliction of emotional distress.

[2] Included in Pikop's complaint were the state-law claims over which the federal court refused to invoke pendent-party jurisdiction.

1975, Gulati injured his hand during the course of his employment with the railroad. He brought suit on September 21, 1977, to recover damages under the FELA for lost wages and permanent disability of his hand. Burlington Northern settled Gulati's suit on March 10, 1980, agreeing to pay Gulati $47,250 and to allow Gulati to continue working as a machinist for the railroad company.

On July 31, 1980, Burlington Northern sent Gulati a notice that the company was investigting him for allegedly falsifying a time card. He was requested to appear at a hearing concerning this charge. Gulati maintained that he had pencilled on his card 6:30 p.m. as the time of his departure on July 28, 1980, and that a co-employee had erased this time and written, in its place, 11:00 p.m. Upon investigation, the railroad dropped the charge against Gulati. It did not, however, further investigate the matter, nor did it bring charges against the co-employee accused of forging Gulati's card.

On August 4, 1980, Burlington Northern sent another notice to Gulati, alleging that he had been involved in an altercation during working hours. He was once again requested to appear at an investigatory hearing. Gulati stated that without provocation a co-employee had sprayed him with a water hose and that he had immediately reported the actions of the co-employee to a supervisor. Burlington Northern dropped the rule-violation charge against Gulati. It did not, however, pursue any disciplinary action against the co-employee whom Gulati had named as the one who sprayed him with water.

During the summer of 1980, an employee of Burlington Northern witnessed two railway employees ransacking Gulati's personal locker. At the time Gulati's locker was allegedly being searched, Gulati was allegedly being detained by a railroad supervisor. The witness noted that the searching of lockers was not a common practice of railroad officials.

Gulati maintains that from March to September, 1980, he was continually subjected to racial slurs from employees of Burlington Northern. Such comments included: "Come over here, Indian," "That stinking Arab," "Where's your camel parked?" and "Does your camel have one hump or two?" One employee stated that he had heard Burlington Northern officials say, "We will get that S.O.B." (referring to Gulati) and, "Have you had any luck getting that S.O.B. 'cause I know you are trying?"

On September 5, 1980, Burlington Northern notified Gulati that the company was investigating him for allegedly leaving work one day without proper authorization. Gulati was requested to appear at an investigatory hearing. After the hearing, the railroad discharged Gulati for the unexcused absence. Gulati appealed this decision to the National Railroad Adjustment Board, Public Law Board No. 3008, which voted 2-1 to uphold his permanent discharge from employment.

Six months after his discharge from Burlington Northern, on March 30, 1981, Gulati suffered a heart attack at the age of 40. After his discharge he also began consulting a psychiatrist.

Gulati filed suit against Burlington Northern in Hennepin County District Court on April 12, 1982. He alleged that Burlington Northern breached the 1980 settlement of his FELA claim; that the company wrongfully discharged him; and that it inflicted emotional distress on him through a pattern of harassment and surveillance. Burlington Northern petitioned to have Gulati's claims removed to federal district court under 28 U.S.C. § 1441 (1982), a petition that was denied by the federal court on September 10, 1982.[3] Thereafter, Bur-

[3] The court recognized that federal removal jurisdiction is derivative, in that only claims that are properly brought in state courts can be removed to federal courts. The court noted that

lington Northern moved for summary judgment in state court. The district court granted the railroad's motion on two of Gulati's claims, concluding that Gulati's wrongful-discharge and breach-of-contract claims were preempted by the Railway Labor Act. The court, however, denied the railroad's motion to dismiss the claim of intentional infliction of emotional distress on similar preemption grounds. Burlington Northern then petitioned the court to certify the preemption question to the Minnesota Court of Appeals under Rule 103.03(h) of the Minnesota Rules of Civil Appellate Procedure. The court granted the motion and certified the following question, as important and doubtful, to the appeals court: "Does the Railway Labor Act and/or the Federal Employers' Liability Act preempt state court jurisdiction over plaintiff's claim of intentional infliction of emotional distress?"

The court of appeals answered the certified questions in the negative, stating that the Federal Employers' Liability Act does not preempt state-court jurisdiction over a claim of intentional infliction of emotional distress and that, although the Railway Labor Act does preempt a claim of intentional infliction of emotional distress where the distress results from a discharge by a railroad, it does not preempt such a claim where the emotional distress results from a pattern of employer harassment. *Gulati v. Burlington Northern Railroad Co.*, 364 N.W.2d 446 (Minn. Ct. App. 1985). We granted Burlington Northern's petition for further review on May 24, 1985, and now answer the certified questions in the negative.

Burlington Northern contended the state court did not have jurisdiction over Gulati's claims. If that were the case, the court stated, a federal court would have no removal jurisdiction. On the other hand, the the court stated, if Gulati were correct in contending that his claims were independent state actions, no federal question would exist on which federal jurisdiction could rest. The removal petition was therefore denied.

The Preemption Doctrine

The preemption doctrine seeks to accommodate the interest of uniform, national regulation on the one hand, and the preservation of federalism on the other. Thus, the fact that Congress has entered a field of regulation does not necessarily preclude all state action in the area. As the United States Supreme Court recently noted: "Preemption of state law by federal statute or regulation is not favored 'in the absence of pervasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakenly so ordained.'" *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)). *See also, Wardair Canada, Inc. v. Florida Department of Revenue*, 54 U.S.L.W. 4687, 4688 (U.S. June 17, 1986) (No. 86-49) ("state law is not pre-empted whenever there is any federal regulation of an activity or industry or area of law"). One authoritative text states:

> Federal law is generally interstitial in its nature. It rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states. This was plainly true in the beginning when the federal legislative product (including the Constitution) was extremely small. It is significantly true today, despite the volume of Congressional enactments, and even within areas where Congress has been very active. Federal legislation, on the whole, has been conceived and drafted on an *ad hoc* basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose. Congress acts, in short, against the background of the total *corpus juris* of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation.

P. Bator, D. Shapiro, P. Mishkin & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System, 470-71 (2d ed. 1973). *See Richards v. United States*, 369 U.S. 1, 7 (1962); *Burks v. Lasker*, 441 U.S. 471, 478 (1979).

Against this theoretical backdrop, the United States Supreme Court has recognized three distinct kinds of cases in which the doctrine applies to preempt state law. The first arises when Congress explicitly states that the federal scheme preempts any state action in the field. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). This instance, however, is rare, for Congress seldom expressly precludes all state law in a given regulatory field. The second case, in which Congress implicitly preempts state law, is somewhat more common. In such a case, preemption is inferred from either the extent of the federal involvement or the scope of the federal interest. *See Fidelity Federal Savings & Loan Association v. De la Cuesta*, 458 U.S. 141, 153 (1982); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Even where Congress has not, either explicitly or implicitly, displaced all state action in a specified field, the preemption doctrine will invalidate any state law that, in fact, conflicts with the federal law. This third case arises when compliance with both the federal and state law is a physical impossibility or when the state law is an obstacle to the accomplishment of the purposes of the federal scheme. *See Florida Lime & Avocado Growers*, 373 U.S. at 142-43; *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

As is evident from the case law, the question of preemption is primarily one of statutory construction. If no express preemptive language is evident in the federal statute or regulation, factors in the federal law that indicate an implicit preemption must be considered. If neither an express nor an implied preemptive effect is present, the nature of the state law or action must be examined to determine whether it conflicts with the fed-

eral scheme. Therefore, we must consider the two federal acts that Burlington Northern contends preempt Pikop's and Gulati's state-law claims.

The Railway Labor Act

In order to avoid interruptions of interstate commerce, Congress first enacted the Railway Labor Act in 1913. RLA, Pub. L. No. 63-6, 38 Stat. 103 (1913) (codified as amended at 45 U.S.C. §§ 151-63 (1982)). The Act seeks to avoid disruptions in railway transportation by providing a process for the resolution of labor disputes. *See Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. 711, 722-23 (1945). As amended, the RLA recognizes the right of railway employees to join a labor organization that can act as the employees' representative in the formation of a collective-bargaining agreement. The law also provides a procedure to settle grievances that arise under an existing collective-bargaining agreement.

Congress did not *expressly* preempt the railway labor field in enacting the Railway Labor Act. Thus, the question with which we are confronted is whether Congress *implicitly* preempted all state action in the area.

The RLA is, no doubt, comprehensive in its regulation of the process leading up to the formation of a collective-bargaining agreement between a railroad and its employees. The designation of a labor organization to represent railway employees is detailed. 45 U.S.C. § 152 (1982). A mediation board to settle disputes concerning the process for a new collective-bargaining agreement is established. 45 U.S.C. § 154-56 (1982). A board of arbitration is also formed to settle collective-bargaining disputes not resolved by the mediation board. 45 U.S.C. § 157-59 (1982). Thus, the resolution of such "major disputes" appears to be an exclusive federal concern.[4]

[4] A major dispute under the RLA concerns the process involved in reaching a new collective-bargaining agreement. 45 U.S.C. § 152 (1982). *See Brotherhood of Railroad Trainmen v. Chicago River*

Congress could not have intended that the states supplement this area by promulgating additional procedures pertaining to the formation of a new collective-bargaining agreement. *See Slocum v. Delaware, Lackawanna & Western Railroad Co.*, 339 U.S. 239 (1950).

In addition to providing a procedure whereby disputes concerning the process for a new collective-bargaining agreement are resolved, Congress included in the RLA a method of resolving so-called "minor disputes"—disagreements over the interpretation or application of existing collective-bargaining agreements.[5] The Act establishes an

---

& Indiana Railroad Co., 353 U.S. 30, 33 (1957); *Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees v. Florida East Coast Railway Co.*, 384 U.S. 238 (1966). In *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. at 723, the United States Supreme Court discussed what constitutes a major dispute:

> The first [referring to major disputes] relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

[5] The United States Supreme Court has defined minor disputes under the RLA as "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation, generally involving only one employee." *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. at 33. In *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. at 723-24, the Court stated:

> In general the difference is between what are regarded traditionally as the major and minor disputes of the railway labor world. The former present the large issues about which strikes ordinarily arise with the consequent interruptions of traffic the Act sought to avoid. Because they more often involve those consequences and because they seek to create rather than to enforce contractual rights, they have been left for settlement entirely to the processes of noncompulsory adjustment.
>
> The so-called minor disputes, on the other hand, involving grievances, affect the smaller differences which inevitably ap-

adjustment board to resolve such disputes and allows the railroad and its employees to form their own dispute-resolution process. 45 U.S.C. § 153 (1982).

In *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320 (1972), the United States Supreme Court held that the procedures for the resolution of minor disputes are mandatory and a railway employee cannot ignore the remedies of the Act by commencing an action in state court to resolve such disputes. The Court overruled its decision in *Moore v. Illinois Central Railroad Co.*, 312 U.S. 630 (1941), in which it was held that the right of a railway employee to sue the railroad for wrongful discharge was not dependent on an exhaustion of the RLA's administrative remedies. The *Andrews* Court fell short of holding that the RLA preempts all state remedies for a minor dispute. It noted, however:

> The term "exhaustion of administrative remedies" in its broader sense may be an entirely appropriate description of the obligation of both the employee and carrier under the Railway Labor Act to resort to dispute settlement procedures provided by that Act. It is clear, however, that in at least some situations the Act makes the federal administrative remedy exclusive, rather than merely requiring exhaustion of remedies in one forum before resorting to another. A party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceed-

---

pear in the carrying out of major agreements and policies or arise incidentally in the course of an employment. They represent specific maladjustments of a detailed or individual quality. They seldom produce strikes, though in exaggerated instances they may do so. Because of their comparatively minor character and the general improbability of their causing interruption of peaceful relations and of traffic, the 1934 Act sets them apart from the major disputes and provides for very different treatment. (Footnotes omitted.)

> ing. He is limited to the judicial review of the Board's proceedings that the Act itself provides. In such a case the proceedings afforded by 45 U.S.C. § 153 First (i), will be the only remedy available to the aggrieved party.

406 U.S. at 325 (citations omitted).

Andrews would preclude a state-law claim that is, in essence, a minor dispute under the RLA. Thus, if Pikop and Gulati were suing Burlington Northern for wrongful discharge, their claims would be preempted by the exclusive procedure of the Act because a discharge from employment is a matter within the parameters of a collective-bargaining agreement and therefore a minor dispute under the RLA. *See Andrews*, 406 U.S. at 324; *Union Pacific Railroad Co. v. Price*, 360 U.S. 601, 617 (1959). *See also, Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984) (railway employee's claim of retaliatory discharge preempted by RLA); *Choate v. Louisville & Nashville Railroad Co.*, 715 F.2d 369 (7th Cir. 1983) (railway employee's claim that railroad wrongfully discharged him and failed to reinstate him is a minor dispute under the RLA); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir. 1978), *cert. denied*, 439 U.S. 930 (1978) (wrongful discharge claim of railway employee preempted).

Unlike a claim of wrongful discharge, a claim of intentional infliction of emotional distress where the distress results from a continual pattern of harassment is not a minor dispute under the RLA. Such a claim does not "stem from differing interpretations of the collective-bargaining agreement," *Andrews*, 406 U.S. at 324, but rather is premised on the tort-law principle that citizens of our state must be protected from conduct "so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community." *Haagenson v. National Farmers Union Property and Casualty Co.*, 277

N.W.2d 648, 652 n.3 (Minn. 1979) (citing the Restatement (Second) of Torts § 46, Comment d (1965)). The conduct that Pikop and Gulati allege transcends the four corners of the collective-bargaining agreement Burlington Northern entered into with its employees. The alleged behavior, if proven, will constitute a continual pattern of harassment on the part of Burlington Northern, conduct that is not merely a wrongful discharge claim or other grievance premised on a collective-bargaining agreement.

Burlington Northern contends that a claim of intentional infliction of emotional distress relates to a working condition and thus must be resolved by the administrative procedures of the Act. We disagree. In *Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943), the United States Supreme Court upheld a state safety requirement that cabooses be attached to all trains operating within the state. The railroad had argued that the RLA precluded the state from regulating such working conditions. The Court disagreed, stating:

> The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce. The Mediation Board and Adjustment Board act to compose differences that threaten continuity of work, not to

remove conditions that threaten the health or safety of workers.

State laws have long regulated a great variety of conditions in transportation and industry, such as sanitary facilities and conditions, safety devices and protections, purity of water supply, fire protection, and innumerable others. Any of these matters might, we suppose, be the subject of a demand by workmen for better protection and upon refusal might be the subject of a labor dispute which would have such effect on interstate commerce that federal agencies might be invoked to deal with some phase of it. But we would hardly be expected to hold that the price of the federal effort to protect the peace and continuity of commerce has been to strike down state sanitary codes, health regulations, factory inspections, and safety provisions for industry and transportation. We suppose employees might consider that state or municipal requirements of fire escapes, fire doors, and fire protection were inadequate and make them the subject of a dispute, at least some phases of which would be of federal concern. But it cannot be that the minimum requirements laid down by state authority are all set aside. *We hold that the enactment by Congress of the Railway Labor Act was not a preemption of the field of regulating working conditions themselves and did not preclude the State of Illinois from making the order in question.*

Id. at 6-7 (footnote and citation omitted; emphasis added). *See also Brotherhood of Locomotive Engineers v. Baltimore & Ohio Railroad Co.*, 372 U.S. 284, 289-90 (1963) (reiterating that the RLA does not regulate "wages, hours, or working conditions").

Although Pikop's and Gulati's claims do not constitute either a major dispute or a minor dispute under the Act, their claims would, nevertheless, be preempted if Con-

gress intended to preclude any claims against the railroad other than those that are, in essence, major or minor disputes under the RLA. In determining such congressional intent, we must examine the potential for interference with the federal scheme that such a claim presents. *See Fidelity Federal Savings*, 458 U.S. at 153; *Rice*, 331 U.S. at 230; *Hines*, 312 U.S. at 67. This potential for interference is then weighed against the nature of the state interest in regulating the conduct in question. Thus, when the potential for interference is nil and the state interest involved is substantial, we can infer that Congress did not intend to preempt the state-law claim. This balancing approach is derived from *Farmer v. United Brotherhood of Carpenters & Joiners of America, Local 25*, 430 U.S. 290 (1977).

In *Farmer*, the United States Supreme Court held that the National Labor Relations Act (NLRA) did not preempt a union member's state-law claim of intentional infliction of emotional distress.[6] The Court in *Farmer* noted that no provision of the NLRA protected the union member from the outrageous conduct alleged in the complaint. Such is the case here. The RLA affords Pikop and Gulati no remedy for conduct that constitutes the intentional infliction of emotional distress. An adjustment board could not award money damages as compensation for the injuries alleged in either Pikop's or Gulati's complaint. The RLA relates only to the collective-

---

[6] Burlington Northern contends that the preemption analysis of *Farmer* is inapplicable to this case because the National Labor Relations Act is not as comprehensive as the Railway Labor Act. We concur, however, in Judge Posner's analysis of the issue in *Jackson v. Consolidated Rail Corp.*, 717 F.2d at 1060 (J. Posner, concurring in part and dissenting in part). "It might be different," Judge Posner noted, "if Congress had established an administrative agency to police tort or tort-like conduct in railroad employment, but it has not; it has contented itself with requiring arbitration of contract disputes." Requiring arbitration of railway contract disputes is not unlike the limited scope of the NLRA's dispute-resolution process.

bargaining process in the railway industry and seeks only to resolve major and minor disputes that arise in that process. No such dispute is claimed here. Therefore, "permitting the exercise of state jurisdiction over such complaints does not result in state regulation of federally protected conduct." *Farmer*, 430 U.S. at 302. *See also Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952) (Black railway employees have a judicial remedy to prevent discrimination because no adequate administrative remedy exists under the RLA).

Moreover, a state trial court considering such a state-law claim by a former railway employee would not be interpreting the railroad's collective-bargaining agreement with its employees, an inquiry that is reserved exclusively to the federal boards established in the RLA. The focus of the state court's investigation would be on whether the elements of the tort alleged have been proven. Such a determination would be made "without resolution of the 'merits' of the underlying labor dispute," if any. *Farmer*, 430 U.S. at 304.

In Minnesota, recovery for the intentional infliction of emotional distress is limited to those cases in which an aggrieved party can establish conduct that was "extreme and outrageous" and "intentional or reckless." The conduct must also have caused emotional distress that is "severe." *Hubbard v. United Press International, Inc.*, 330 N.W.2d 428, 438-39 (Minn. 1983). As we noted in *Hubbard*:

> In explaining both the extreme nature of the conduct necessary to invoke this tort, and the necessary degree of severity of the consequent mental distress, the Restatement's commentary emphasizes the limited scope of this cause of action, and clearly reflects a strong policy to prevent fictitious and speculative claims. Because this policy has long been a central feature of Minnesota law on the availability of damages for mental distress, our adoption of the Re-

> statement formulation as the standard for the independent tort of intentional infliction of emotional distress does not signal an appreciable expansion in the scope of conduct actionable under this theory of recovery. The operation of this tort is sharply limited to cases involving particularly egregious facts.

Id. at 439 (footnote omitted). The fact that the tort is limited to such cases decreases the potential for undue interference with the RLA. *See Farmer*, 430 U.S. at 305.

It is apparent that our recognition of a state remedy for the intentional infliction of emotional distress in this case would not frustrate the collective-bargaining process of the RLA. In *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969), the Court held that the RLA does not allow a state to preclude all self-help remedies to a railway carrier or union after the parties have exhausted the administrative procedures of the Act. Such a preclusion, the Court said, would make the Act's entire scheme for the resolution of major disputes meaningless. Here, such is not the case. Unlike the state action in *Jacksonville*, a state remedy for the intentional infliction of emotional distress does not relate to the collective-bargaining process itself. The Act only serves to regulate such a process and thus Burlington Northern's argument that the potential for interference with the RLA scheme is such that preemption is mandated carries no weight.

Balanced against any interference with the federal scheme that such a tort claim may produce is the nature of the state's interest in protecting its citizens from the kind of conduct the tort action seeks to redress. *Farmer*, 430 U.S. at 302. The state interest in this case is substantial. In *Farmer*, the Court discussed the interest a state has in affording its citizens a remedy for the intentional infliction of emotional distress:

> The State, on the other hand, has a substantial interest in protecting its citizens from the kind of abuse of which Hill complained. That interest is no less worthy of recognition because it concerns protection from emotional distress caused by outrageous conduct, rather than protection from physical injury, as in *Russell*, or damage to reputation, as in *Linn*. Although recognition of the tort of intentional infliction of emotional distress is a comparatively recent development in state law, see W. Prosser, Law of Torts, § 12, pp. 49-50, 56 (4th ed. 1971), our decisions permitting the exercise of state jurisdiction in tort actions based on violence or defamation have not rested on the history of the tort at issue, but rather on the nature of the State's interest in protecting the health and well-being of its citizens.

Id. at 302-03. Minnesota has a strong interest in protecting its citizens from outrageous emotional abuse because the emotional health and well-being of its citizens is vital, not only to a stable economy, but to a civilized culture. The conduct Pikop and Gulati complain of touches interests "deeply rooted in local feeling and responsibility." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959).

In light of the substantial interest the state has in such tort actions and the lack of interference such an action places on the federal railway labor process, we hold that the RLA does not preempt a state-law claim of intentional infliction of emotional distress where the alleged distress results, not from a wrongful discharge, but from a continual pattern of harassment on the part of the railroad-employer.

The Federal Employers' Liability Act

Congress enacted the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, to allow interstate railway employees and their dependent families to recover damages for in-

juries and death caused by the negligence of the railroad. Section 51 of the Act expressly limits liability to injuries or death "resulting in whole or in part from the *negligence* of any of the officers, agents, or employees of such carrier * * *." 45 U.S.C. § 51 (1982) (emphasis added). Here, Pikop and Gulati are alleging that Burlington Northern intentionally inflicted emotional distress, a tort not premised, of course, on principles of negligence. In determining whether such a claim is preempted by the FELA, we must first consider whether a claim of intentional infliction of emotional distress constitutes a claim under the Act or whether it is separate and independent from the federal statute.

Although the FELA is couched in terms of negligence, the United States Supreme Court, using two distinct theories, has allowed FELA plaintiffs to recover for intentional assaults committed by co-employees. In *Jamison v. Encarnacion*, 281 U.S. 635 (1930), the Court applied the doctrine of respondeat superior and held that the term "negligence" in the Act was broad enough to include an assault committed by a railway employee in the course of discharging his or her duties and in furtherance of the railroad's business. In *Harrison v. Missouri Pacific Railroad Co.*, 372 U.S. 248 (1963) (per curiam), the Court, recognizing a direct-negligence theory of liability under the Act, held that a railroad can be liable if it hires and retains an employee disposed toward violence and that employee intentionally assaults a co-employee. Although the two theories on which the Court premised liability in these two cases are broad enough to encompass some other intentional acts in the railway context, the Court has not extended the FELA to cover intentional torts other than assault.

Using the respondeat superior and direct-negligence theories, lower federal courts have found liability under the Act for not only assault, but also battery and false arrest. *See, e.g., Slaughter v. Atlantic Coast Line Rail-*

road Co., 302 F.2d 912 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 827 (1962); *Besta v. Consolidated Rail Corp.*, 580 F. Supp. 869 (S.D. N.Y. 1984). An examination of federal case law, however, reveals that recovery for intentional acts under the FELA is limited to intentional torts that cause *physical* injury. As the United States Court of Appeals for the Seventh Circuit recently noted: "[T]he FELA does not reach torts which work their harm through nonphysical means * * *." *Lancaster v. Norfolk & Western Railway Co.*, 773 F.2d 807, 815 (7th Cir. 1985). This appears to be a well-established limitation of the FELA. *See, e.g., Bullard v. Central Vermont Railway, Inc.*, 565 F.2d 193 (1st Cir. 1977) (the Act allows recovery for emotional distress that accompanies physical injuries); *McSorley v. Consolidated Rail Corp.*, 581 F. Supp. 642 (S.D. N.Y. 1984) (the Act may cover intentional conduct that causes physical injury); *Cales v. Chesapeake & Ohio Railway Co.*, 300 F. Supp. 155 (W.D. Va. 1969) (an intentional tort that inflicts bodily injury may constitute negligence under the Act); Annot., 8 A.L.R.3d 442 (1966 & Supp. 1985).[7]

In order to recover for the intentional infliction of emotional distress, a plaintiff need not establish any physical injury, for the action seeks to compensate purely emotional injuries resulting from intentional acts. Neither the express language of the FELA nor its interpretation by federal courts covers such a claim. Indeed, at least two federal courts of appeals have considered the

---

[7] The Ninth Circuit Court of Appeals, however, has held that where an employee has suffered an injury "attributable to employer negligence," the injury, whether characterized as mental or physical, is compensable under the FELA. *Buell v. Atchison, Topeka & Santa Fe Railway Co.*, 771 F.2d 1320 (9th Cir. 1985), *cert. granted* 106 S.Ct. 1946 (1986). Such a holding is very much in the minority. Moreover, the decision appears not to cover allegations of *intentional* infliction of emotional distress, but rather *negligent* acts on the part of co-employees, which inflict emotional injuries. *See, id.* at 1324.

action to be independent of any claim arising under the Act. In *Lewis v. Louisville & Nashville Railroad Co.*, 758 F.2d 219, 221-22 (7th Cir. 1985), the court stated:

> The Railroad also argues that the intimidation count is not "separate and independent" because it involves "substantially the same facts and transactions" as the three FELA claims filed in state court. We disagree. The plaintiff premised his FELA counts on his injuries of April 19, 1977 and September 6, 1979. The wrong that he alleged was the negligence of the railroad up to the date of his second injury. The intimidation count, by contrast, concerns an alleged intentional tort committed by the Railroad after he filed the first FELA claim. Since the intimidation claim alleged a different wrong and involved a different set of facts than the FELA claims, the intimidation claim was a "separate and independent" claim for purposes of section 1441(c) [removal jurisdiction].

(Citation omitted.) In *Tello v. Soo Line Railroad Co.*, 772 F.2d 458 (8th Cir. 1985), the court noted that a railway employee's claim of intentional infliction of emotional distress is a "state law claim." *Id.* at 461.

Even though Pikop's and Gulati's claims of intentional infliction of emotional distress appear to fall outside the scope of the FELA, their claims may, nevertheless, be preempted if Congress intended to preclude all state action in the area. In enacting the FELA, Congress did not *explicitly* preempt the field. Thus, the question becomes whether it *implicitly* did so.

Congress' first attempt to enact compensatory relief for railway employees who were victims of railroad negligence came in 1906. The 1906 Act enacted a compensatory scheme that was premised on common-law notions of fault. Congress, however, modified the common law in two specific areas: it abolished the fellow-servant rule

(which had acted to bar employees' recovery against their employer for injuries resulting from the negligence of co-employees) and relaxed the common law contributory negligence bar (Congress allowed recovery in cases in which the negligence of the employee was slight compared to the gross negligence of the railroad or co-employee). FELA, Pub. L. No. 59-219, 34 Stat. 232 (1906). The 1906 Act, however, had a short life. In 1908, the Supreme Court, in *Howard v. Illinois Central Railroad Co.*, 207 U.S. 463 (1908), struck down the statute, holding that Congress could impose liability only in those cases in which a railway employee was killed or injured *while the railroad was engaged in interstate commerce*. Congress enacted another version of the FELA in late 1908. The 1908 Act established a fault-based scheme for compensation. Congress, however, rejected the 1906 Act's modified contributory negligence bar and adopted in its place a comparative negligence scheme. It also changed the common law in other specific areas, abolishing the assumption-of-risk defense and the fellow-servant rule. FELA, Pub. L. No. 60-100, 35 Stat. 65 (1908).[8]

Although the FELA did not establish a strict liability workers' compensation scheme, the United States Supreme Court in *New York Central Railroad Co. v. Winfield*, 244 U.S. 147 (1917), held that a railway employee cannot ignore the Act and instead rely on a state workers' compensation statute for a remedy against the railroad. A railway employee's reliance on a state strict liability compensatory scheme, the Court reasoned, would frustrate Congress' intent to enact a compensatory scheme

---

[8] The 1908 Act was amended in 1910 to provide for concurrent jurisdiction of FELA claims and to preclude railroads from removing FELA actions filed in state courts. FELA, Pub. L. No. 61-117, 36 Stat. 291 (1910). In 1939, Congress amended the Act to extend the statute of limitations from two to three years and to expand the definition of interstate commerce in light of more recent Supreme Court rulings. FELA, Pub. L. No. 76-382, 53 Stat. 1404 (1939).

that was premised on notions of fault. Therefore, the state workers' compensation statute as applied to railway employees was preempted by the FELA.

We believe that affording the railway employees in this case the state-tort remedy of intentional infliction of emotional distress will not similarly frustrate the fault-based scheme of the FELA. The state tort action would not impose strict liability on the railroad, but instead would apply common law principles of fault. As Justice Goldberg noted in *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 164 n.3 (1964) (J. Goldberg, dissenting in part): "*New York Central R. Co. v. Winfield, supra,* could require no more than pre-emption of *purely* state strict liability remedies." (Emphasis in original.)

We recognize, however, that some potential for interference may be present when a railway employee sues in state court for the intentional infliction of emotional distress. The enactment of a federal compensatory scheme implies that Congress did not intend for interstate commerce to be hampered by different state systems of compensation. This is certainly true in the context of physical injuries and death resulting from railroad negligence. Such interference, however, is minimized where emotional harm is alleged to have resulted from a continual pattern of intentional acts. The claim of intentional infliction of emotional distress lies outside the scope of this federal statute, which was enacted to compensate only physical injuries resulting from negligence. The fact that the state-law tort is sharply limited to cases involving particularly egregious facts further reduces any potential for interference with the federal scheme.

Balanced against the potential for interference with the federal scheme is the nature of the state interest involved. As we have already noted, Minnesota has a substantial interest in protecting its citizens from the type

of harm that constitutes the intentional infliction of emotional distress. *See Farmer*, 430 U.S. at 302. To deny Pikop and Gulati the protection from this kind of conduct the state provides to each of its other citizens is to diminish the very importance of the state interest involved. Because the state interest is substantial and the potential for interference is minimal, we hold that the FELA does not preempt a railway employee's state-law claim of intentional infliction of emotional distress.

The judgment of the district court in Case No. C4-85-1431, *Pikop v. Burlington Northern Railroad Co.*, is reversed.

The certified questions are answered in the negative in Case No. C7-84-1333, *Gulati v. Burlington Northern Railroad Co.*

KELLEY, Justice (dissenting):

Because I conclude the claims of Pikop and Gulati for intentional infliction of emotional distress solely arose out of their employment with the Burlington Northern and that the Federal Employers' Liability Act provides those employees with their exclusive remedy, I respectfully dissent.

The Federal Employers' Liability Act governs the recovery of damages for injuries or death by employees, or their dependent families, from employer carriers. Although the literal wording of the statute limits the carrier's liability to compensation for injuries or death caused by "negligence" of employees, 45 U.S.C. § 51 (1982), the act is demonstrative of the underlying supposition that safety of the physical and mental health of railroad employees is encouraged by the economic incentive of placing liability upon the employer. Thus, notwithstanding the statutory language speaks in terms of "negligence," the United States Supreme Court has permitted injured employees to recover from employers even though the act or acts giving rise to the injury were "intentional." *See, e.g., Jamison v. Encarnacion*, 281 U.S. 635 (1930) where the court held that assaults committed by railroad employees against fellow employees in the course of the railroad employment were compensable in suits against the carrier. *See generally*, Note, *Respondent Superior and the Intentional Tort: A Short Discourse on How to Make Assault and Battery A Part of the Job*, 45 U. Cin. L. Rev. 235 (1976). *See also*, Annot., 8 A.L.R.3d 442 (1966).

The Court of Appeals for the Ninth Circuit in *Buell v. Atchison, Topeka & Santa Fe Railway Co.*, 771 F.2d 1320 (9th Cir. 1985), held that an employee's allegation that he had sustained emotional injury caused by intentional acts of railroad employees stated a claim under the FELA. In *Lancaster v. Norfolk & Western Railway*

Co., 773 F.2d 807, 818 (7th Cir. 1985), the court recognized employee recovery under the FELA for intentional tort if the evidence established either that the intentional act (or acts) was done in furtherance of the railroad's objectives or that the company negligently hired, supervised, or failed to fire the employee who committed the tort.

Since the claimed injuries clearly and exclusively arose out of their employment by the Burlington Northern, the FELA provides to these plaintiffs the exclusive remedy for those claimed injuries. Even if that act afforded no remedy to these claims, the act is all comprehensive. *See, e.g. New York Central Railroad Co. v. Winfield*, 244 U.S. 147 (1917). The purpose of Congress in enacting the Federal Employers' Liability Act, and the federal courts in construing it, is clearly to provide a uniform and exclusive compensatory program to govern claims made by employees against employing railroads for damages arising out of the employment relationship.

Accordingly, I would hold that the Federal Employers' Liability Act, 45 U.S.C. § 51-60 (1982) pre-empts an employee's claim of damage against a railroad employer when the claim arises from intentional infliction of emotional distress if the acts giving rise to the claim are committed solely and exclusively during the course of the employment relationship.

Therefore, I would affirm the district court in *Pikop v. Burlington Northern Railroad*, and would answer the certified question in *Gulati v. Burlington Northern Railroad Co.* in the affirmative.

APPENDIX B

STATE OF MINNESOTA
IN SUPREME COURT

C7-84-1333

ROMESH GULATI,
Respondent,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,
Appellant.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Burlington Northern Railroad Company for further review of the decision of the Court of Appeals be, and the same is, granted. Briefs shall be filed in the quantity, form and within the time limitations contained in Minn. R. Civ. App. P. 131 and 132. Counsel will be notified at a later date of the time for argument before this court. No requests for extensions of time for the filing of briefs will be entertained.

Dated: May 24, 1985

BY THE COURT:

/s/
Associate Justice

APPENDIX C

STATE OF MINNESOTA
IN COURT OF APPEALS

C7-84-1333

Hennepin County Nierengarten, Judge

ROMESH GULATI,
Respondent,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,
Appellant.

Filed March 12, 1985
Wayne Tschimperle, Clerk
Minnesota Court of Appeals

Michael D. Doshan
4644 IDS Center
80 South Eighth Street
Minneapolis, MN 55402

Michael P. McReynolds
Burlington Northern
Railroad Company
176 East Fifth Street
St. Paul, MN 55101

SYLLABUS

1. The Railway Labor Act preempts state court jurisdiction over plaintiff's claim of intentional infliction of

emotional distress resulting from his discharge. It does not preempt a claim for the intentional infliction of emotional distress when the distress results from a pattern of harassment.

2. The Federal Employers' Liability Act does not preempt a claim for the intentional infliction of emotional distress.

Certified Question Answered.

Considered and decided by Popovich, Chief Judge, Nierengarten, Judge, and Randall, Judge, with oral argument waived.

OPINION

NIERENGARTEN, Judge

Respondent Gulati brought an action against appellant Burlington Northern, his former employer, alleging (1) Burlington Northern had breached an agreement settling a Federal Employers' Liability Act (FELA) suit previously brought by him; (2) he was wrongly discharged from Burlington Northern's employ in retaliation for bringing the previous FELA law suit; and (3) intentional infliction of emotional distress. Burlington moved to dismiss for lack of subject matter jurisdiction, contending common law actions were preempted by the Railway Labor Act, 45 U.S.C.A. §§ 151-159a (1972 and Supp. 1983), and the Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-60 (1972). The trial court dismissed the contract claims but not Gulati's claim of intentional infliction of emotional distress, finding that claim fell within the exception to the preemption doctrine enunciated in *Farmer v. United Brotherhood of Carpenters, Local 25*, 430 U.S. 290 (1977).

FACTS

Gulati was employed by Burlington Northern as a machinist for 15 years and was a member of the machinists union.

In 1975, Gulati injured his hand during the course of his employment and filed a claim against Burlington under the Federal Employers' Liability Act. Burlington settled March 10, 1980, for $47,250 on an in-service basis which did not affect Gulati's status as an employee.

In the winter of 1979-80, Gulati became subject to constant surveillance while at work, his arrivals and departures being closely monitored by his supervisor. The same surveillance did not extend to his co-employees.

In the summer of 1980, Burlington launched a series of investigations against Gulati. On one occasion, two Burlington officials rifled his private locker. On another occasion Gulati was charged with falsifying a time card but a fellow employee believed the charge was dropped because a foreman forged the card in order to get Gulati fired.

A fellow employee heard Burlington officials say "[w]e will get that S.O.B." and "[h]ave you had any luck getting that S.O.B. 'cause I know you are trying.'" These officials referred to Gulati as "[t]hat stinking Arab," addressing him "[c]ome over here Indian," "[w]here's your camel parked," and "[d]oes your camel have one hump or two?"

His thoroughness in inspecting locomotives for defects prompted a supervisor to vow that he was going to "get Romesh."

The fellow employee testified the harassment made Gulati so tense that he would not dare ride in a car with him, adding "I personally do not know how Romesh Gulati was able to withstand the enormous pressure on him."

Gulati was dismissed in October 1980 for a company rule violation by absenting himself from duty without proper authority in August 1980. The discharge was upheld by the National Railroad Adjustment Board.

In March 1981, Gulati suffered an anterior myocardial infarction.

ISSUE

Certified Question: Does the Railway Labor Act and/or the Federal Employers' Liability Act preempt state court jurisditcion over plaintiff's claim of intentional infliction of emotional distress?

ANALYSIS

I

Gulati alleges that as a result of the wrongful conduct of Burlington, he suffered emotional distress and deterioration in his physical well-being, including the onset of the infarction. He claims the multiple investigations he was subject to and the charges placed against him constituted retaliation for his suing to recover for injuries to his hand.

Burlington's position is that a common law action for the intentional infliction of emotional distress is preempted by the Railway Labor Act (RLA), 45 U.S.C.A. §§ 151-159(a) (1972 and Supp. 1983), which provides for mandatory arbitration of "minor disputes." Gulati contends that his tort claim falls within the exception created by *Farmer v. United Brotherhood of Carpenters, Local 25*, 430 U.S. 290 (1977).

Farmer brought an action in state court against his union claiming intentional infliction of emotional distress and unlawful discrimination in job referrals. The United States Supreme Court, rejecting a strictly mechanical approach to questions of preemption in the field of labor law relations, held that the state court could exercise jurisdiction over such a claim, even though the campaign of harassment included hiring hall referral discrimination. The Court stated that one must determine the scope of the general preemption rule "by examining the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme." *Farmer*, 430 at 297. To avoid preemp-

tion, the state's interest must be "so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the state of the power to act." *Id.* at 296-97, (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243-44 (1959)).

In applying this test, the Supreme Court in *Farmer* determined that the State of California had a substantial interest in protecting its citizens from intentional infliction of emotional distress. It also determined that neither the National Labor Relations Act nor the collective bargaining agreement protected against the alleged "outrageous" conduct. The court recognized that, because the abusive conduct was intertwined with allegations of hiring hall discrimination, there was some potential that the state claim would touch on areas generally within the exclusive jurisdiction of the National Labor Relations Board. However, the court found this potential interference did not overcome the state's interest because resolution of the state tort suit turned on whether the union's actions had caused the plaintiff's emotional distress, while the focus of an unfair labor practice inquiry would have been on whether the union's conduct discriminated against the plaintiff in terms of employment opportunities. Thus, "the tort action could be resolved without reference to any accommodation of the special interests of unions and members in the hiring hall context." *Farmer*, 430 at 305.

Similarly, in *Sears, Roebuck and Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), the Supreme Court held that Sears could rely on state trespass laws in seeking an injunction against union picketing on its private property.

> The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is iden-

> tical to (as in *Garner*) or different from (as in *Farmer*) that which could have been, but was not, presented to the Labor Board.

Id. at 197.

In applying *Farmer* to this case, we must examine Minnesota's interest in regulating the conduct in question and the potential for interference with the RLA.

The mandatory arbitration provisions of the Railway Labor Act were designed "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C.A. § 151a(5) (1972). Disputes growing out of grievances or interpretation or application of agreements are called minor disputes. *Majors v. U.S. Air, Inc.*, 525 F. Supp. 853, 855 (D. Md. 1981). "The arbitration provisions for minor disputes * * * preempt state remedies." *Id.*

Gulati claims his discharge in October 1980, was in retaliation for his suit against Burlington to recover for injuries to his hand. Normally, an action for wrongful discharge by an employee against a railroad is a minor dispute and subject to the exclusive grievance and arbitration procedures of the RLA because a collective bargaining agreement is necessarily the source of a claim that a discharge is wrongful. *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320 (1972). A claim for intentional infliction of emotional distress based on the process leading to discharge is also a minor dispute within the exclusive province of the grievance mechanisms. *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978).

A retaliatory discharge is one variety of wrongful discharge. *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045, 1049 (7th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 1000 (1984).

There is no question that Gulati's right not to be discharged at the will of Burlington Northern grows out of the collective bargaining agreement. Consequently, his claim of intentional infliction of emotional distress resulting from the discharge constitutes a minor dispute and falls within the exclusive province of the grievance procedures established by RLA. *See id.*

However, Gulati also alleges that the unfounded investigations of Burlington, part of an alleged campaign of personal abuse and harassment, constituted retaliation for his suit to recover for injuries to his hand, and as a result, he suffered emotional distress.

Minneota recognizes the tort of intentional infliction of emotional distress. *Hubbard v. United Press International, Inc.*, 330 N.W.2d 428 (Minn. 1983). Four distinct elements of proof are necessary to sustain a claim:

> (1) the conduct must be extreme and outrageous; (2) the conduct must be intentional or reckless; (3) it must cause emotional distress; and (4) the distress must be severe.

Id. at 438-39. Outrageous conduct is judicially defined as "so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community." *Id.* at 439 (quoting *Haagenson v. National Farmers Union Property and Casualty Co.*, 277 N.W.2d 648, 652 n.3 (Minn. 1979). Clearly Minnesota's interest in regulating such conduct is strong.

That will not stand by itself. In addition, we must examine the potential for interference with the RLA. First, we note that the RLA itself does not protect against outrageous conduct. *Balzeit v. Southern Pacific Transportation Co.*, 569 F. Supp. 986 (N.D. Calif. 1983). Although, as in *Farmer*, there is some potential that Gulati's claim touches on areas generally within the exclusive jurisdiction of the RLA, as, for example, investigations provided by the collective bargaining agreement,

we conclude that the potential for interference is minimal. Charges and investigations are governed by the collective bargaining agreement. In this case, charges made by Burlington Northern are part of the pattern of outrageous conduct. However, in an action for intentional infliction of emotional distress, there will be no need to interfere with the jurisdiction of the RLA because the charges did not result in discipline. Rather, the focus of the state inquiry will be whether the unfounded charge against Gulati and investigations that appear in a category not envisioned by the collective bargaining agreement were brought to intimidate him, thereby inflicting emotional distress.

We conclude that Gulati's allegations of outrageous conduct based upon the unfounded charges are separate from the charge which led to his discharge, and, therefore, are not preempted by the RLA.

II

Burlington also contends that Gulati's claim is preempted by the Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-60 (1972), while at the same time, refusing to concede that an action for an intentional tort could be brought under the act.

The FELA provides that railroads engaged in interstate commerce shall be liable "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees * * *." 45 U.S.C.A. § 51.

In *New York Central Railroad Co. v. Winfield*, 244 U.S. 147 (1917), the Supreme Court broadly read "negligence" to include injuries which "arose out of one of the ordinary risks of the work," and, therefore, compensable without the necessity of negligence.

FELA coverage has not been extended to include intentional torts. Moreover, it strictly limits damages to

physical injury or death. Therefore, we conclude that it does not preempt a state action.

DECISION

Certified Question: Does the Railway Labor Act and/or Federal Employers' Liability Act preempt state court jurisdiction over plaintiff's claim of intentional infliction of emotional distress?

We answer the question as follows: The Railway Labor Act preempts state court jurisdiction over plaintiff's claim of intentional infliction of emotional distress resulting from his discharge. It does not preempt the remainder of his claim.

The Federal Employers' Liability Act does not preempt a claim for the intentional infliction of emotional distress.

Certified Question Answered.

APPENDIX D

STATE OF MINNESOTA
COUNTY OF HENNEPIN
DISTRICT COURT
FOURTH JUDICIAL DISTRICT

ROMESH GULATI,

Plaintiff,

vs.

BURLINGTON NORTHERN, INC.,

Defendant.

Question Certified to Minnesota Court of Appeals
Pursuant To Minnesota Rules of
Civil Appellate Procedure, Rule 103.03(h)

The above-entitled matter came on for hearing before the Honorable Delila F. Pierce, one of the judges of the above-named court on June 18, 1984, at the Government Center, City of Minneapolis, County of Hennepin, State of Minnesota, on Defendant's motion to certify a question to the Minnesota Court of Appeals as important and doubtful.

Michael D. Doshan, Esq., 4644 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota 55402, appeared as counsel for Plaintiff. Michael P. McReynolds, Esq., 176 East Fifth Street, St. Paul, Minnesota 55101, appeared as counsel for Defendant.

This Court hereby certifies the following question, finding it important and doubtful, to the Minnesota Court of Appeals because its resolution at this point of the litigation is in the interests of justice:

DOES THE RAILWAY LABOR ACT AND/OR THE FEDERAL EMPLOYER'S LIABILITY ACT PRE-EMPT STATE COURT JURISDICTION OVER PLAINTIFF'S CLAIM OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS?

That this Court's Order and Memorandum dated May 15, 1984, and the entire file of record with the Hennepin County District Court be and hereby is incorporated by reference.

BY THE COURT:

/s/ Delila F. Pierce
DELILA F. PIERCE
Judge of District Court

Dated: June 26, 1984.

APPENDIX E

STATE OF MINNESOTA
COUNTY OF HENNEPIN
DISTRICT COURT
FOURTH JUDICIAL DISTRICT

File No. 791184

ROMESH GULATI,

Plaintiff,

—vs.—

BURLINGTON NORTHERN, INC.,
(now Burlington Northern Railroad Company),

Defendant.

ORDER AND MEMORANDUM

The above-entitled matter came on for hearing before the Honorable Delila F. Pierce, one of the judges of the above-named court, on the 11th day of April, 1984, upon Defendant's Motion to Dismiss, at the Government Center, City of Minneapolis, County of Hennepin and State of Minnesota.

Michael D. Doshan, Esq., and James Lord, Esq., appeared as counsel for and on behalf of the Plaintiff. Michael McReynolds, Esq., John D. Boelter, Esq., and Barry McGrath, Esq., appeared as counsel for and on behalf of the Defendant.

Now, therefore, upon the files, records, proceedings and arguments of counsel,

IT IS HEREBY ORDERED:

1. That Defendant's Motion to Dismiss as to Plaintiff's cause of action for intentional infliction of emotional distress, along with his claim for punitive dam-

ages, is hereby denied, this Court having jurisdiction to hear such an action. Defendant's Motion to Dismiss Plaintiff's other claims is hereby granted.

2. That the following Memorandum be made a part of this Order.

BY THE COURT:

Dated: May 15, 1984. /s/ Delila F. Pierce
DELILA F. PIERCE
Judge of District Court

MEMORANDUM

Plaintiff alleges that he was a victim of intentional, malicious and abusive conduct by Defendant over a period of months. Plaintiff's allegations include the following: that he was under extraordinary constant surveillance and scrutiny by his supervisors; that he was denied routine privileges by his supervisors; that he was called derogatory names by officials of BNR; that he was a target of ethnic slurs and comments by BNR officials; that his private locker was ransacked by BNR officials; that he was publicly embarrassed and humiliated by a BNR official at a shareholder's meeting when he approached the open microphone and was told by the official to sit down and shut up; that he was abused and humiliated when, for a period of several weeks, a derogatory comment written about him on a company urinal was allowed to remain there despite his complaint to a supervisor; that BNR officials were heard to say that they would "get Romesh" and "get that S.O.B."

The case at bar falls within the exception to the preemption doctrine under *Farmer v. Carpenter*, 430 U.S. 290 (1977) due to the serious nature of Plaintiff's allegations; due to the alleged conduct not being an isolated incident, but occurring over an extended period of time; and, due to Plaintiff's allegation that he suffered a heart

attack as a result of the emotional distress caused by the alleged course of conduct.

Farmer requires that a case pass a two-pronged test before it can be exempt from the pre-emption doctrine. First, it must touch interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, the Court could not infer that Congress had deprived the states of the power to act. *Id.* at 296. Second, judicial supervision will not disservice the interests promoted by federal labor statutes. *Id.* at 297.

The standard that is applied in determining whether the first prong of the *Farmer* test is met coincides with the standard for a cause of action in Minnesota for the intentional infliction of emotional distress. The state law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. *Hubbard v. United Press International,* 330 N.W.2d 428 (Minn. 1983). See also *Farmer* at 294. Plaintiff's allegations are sufficient to satisfy the first prong of the *Farmer* test.

Farmer involved the N.L.R.A. while the case herein involves the Railway Labor Act. The latter act is more broad in its scope than the N.L.R.A. and it governs normal incidents of the employment relation. *Majors v. U.S. Air, Inc.,* 525 F. Supp. 853 (D.Md. 1981). In *Majors,* the RLA was said to control an investigation of a suspected employee theft despite allegedly tortious conduct committed in the course of this investigation.

In the case before this Court, the alleged tortious conduct occured over a long period of time and it hardly could be considered a normal incident of employment. Therefore, state judicial supervision would not interfere with a federal regulatory scheme and this case satisfies the second prong of the *Farmer* test.

For the above reasons, Plaintiff's cause of action for intentional infliction of emotional distress, along with his claim for punitive damages, is not dismissed. Plaintiff's action, however, must allow for adjudication without resolution of the merits of the underlying labor dispute. *Farmer* at 304. If there is evidence to support Plaintiff's cause of action for intentional infliction of emotional distress, it is for the jury to decide the case. Plaintiff's cause of action for breach of contract is so intertwined with the underlying labor dispute that federal law preempts that claim.

D. F. P.

APPENDIX F

STATE OF MINNESOTA
OFFICE OF THE CLERK OF THE
APPELLATE COURTS
STATE CAPITOL, ST. PAUL

Date: 8-29-86

C4-85-1431

VIRGINIA PIKOP,

Appellant,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,
Respondent,

CLARENCE PATTERSON, *et al.*,
Defendants,

and

C7-84-1333

ROMESH GULATI,

Respondents,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner, Appellant.

Please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petition for reargument herein be and the same hereby is denied and stay vacated.

IT IS FURTHER ORDERED, that no attorney's fees are allowed pursuant to Rule 140, Rules of Civil Appellate Procedure.

Respectfully,

/s/ Wayne Tschimperle
Clerk of the Appellate Courts

APPENDIX G

45 U.S.C. § 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review. There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act [enacted June 21, 1934], and it is hereby provided—

* * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act [enacted June 21, 1934], shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

APPENDIX H

Collective Bargaining Agreement Between Burlington Northern Inc. And Its Mechanical Employees

Rule 34. CLAIMS OR GRIEVANCES

(a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Carrier shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.

(b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within sixty (60) days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employees as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the sixty (60) day period for either a decision or appeal, up to and including the highest officer of the Carrier designated for that purpose.

(c) The requirements outlined in paragraphs (a) and (b), pertaining to appeal by the employee and decision by the Carrier, shall govern in appeals taken to each

succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Carrier to handle such disputes. All claims or grievances involved in a decision by the highest designated officer shall be barred unless within nine (9) months from the date of said officer's decision proceedings are instituted by the employee or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board or a system group or regional board of adjustment that has been agreed to by the parties hereto as provided in Section 3 Second of the Railway Labor Act. It is understood, however, that the parties may by agreement in any particular case extend the nine (9) months' period herein referred to.

(d) A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than 60 days prior to the filing thereof. With respect to claims and grievances involving an employee held out of service in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient.

(e) This rule recognizes the right of representatives of the Organizations, parties hereto, to file and prosecute claims and grievances for and on behalf of the employees they represent.

(f) This agreement is not intended to deny the right of the employees to use any other lawful action for the settlement of claims or grievances provided such action is instituted within nine (9) months of the date of the decision of the highest designated officer of the Carrier.

(g) This rule shall not apply to requests for leniency.

(h) Conferences between local officials and local committees will be held during the regular working hours of the day shift without loss of time to committeemen, providing such conferences are held at the point where committeemen are employed.

(i) Prior to assertion of grievances as herein provided, and while questions of grievances are pending, there will neither be a shutdown by the employer nor a suspension of work by the employees.

Rule 35. INVESTIGATIONS

(a) An employee in service more than sixty (60) days will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held not later than thirty (30) days from the date of the occurrence, except that personal conduct cases will be subject to the thirty (30) day limit from the date information is obtained by an officer of the Carrier and except as provided in (b) hereof.

(b) In the case of an employee who may be held out of service in cases involving serious infraction of rules pending investigation, the investigation shall be held within ten (10) days after date withheld from service. He will be notified at time held out of service of the reason therefor.

(c) At least five (5) days advance written notice of the investigation shall be given the employee and the appropriate local organization representative, in order that the employee may arrange for representation by a duly authorized representative and for presence of necessary witnesses he may desire. The notice must specify the charge for which investigation is being held.

(d) A decision shall be rendered within thirty (30) days following the investigation, and written notice of discipline will be given the employee, with copy to local organization's representative.

(e) The employee and the duly authorized representative shall be furnished a copy of the transcript of investigation. Employee or his representative will not be denied the right to take a stenographic or tape recording of the investigation.

(f) The investigation provided for herein may be waived by the employee in writing, in the presence of a duly authorized representative.

(g) If it is found that an employee has been unjustly disciplined or dismissed, such discipline shall be set aside and removed from the record. He shall be reinstated with his seniority rights unimpaired, and be compensated for wage loss, if any, suffered by him, resulting from such discipline or suspension, less any amount earned during such period the disciplinary action was in effect.

(h) The provisions of Rule 34 shall be applicable to the filing of claims and to appeals in discipline cases.

(i) The date for holding an investigation may be postponed if mutually agreed to by the Carrier and the employee or his duly authorized representative.

(j) If investigation is not held or decision rendered within the time limits herein specified, or as extended by agreed-to postponement, the charges against the employee shall be considered as having been dismissed.

APPENDIX I

STATEMENT REQUIRED BY RULE 28.1:

Listed below are all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of Burlington Northern Railroad Company:

Burlington Northern, Inc.
The Belt Railway Company of Chicago
Burlington Northern Dock Corporation
Burlington Northern (Manitoba) Limited
Burlington Northern (Oregon-Washington), Inc.
Burlington Northern Railroad Properties, Inc.
Camas Prairie Railroad Company
Clarklon, Inc.
Clarklon Royalty, Inc.
The Colorado & Southern Railway Company
Davenport, Rock Island & North Western Railway Company
The Denver Union Terminal Railway Company
The Fort Worth and Denver Railway Company
Galveston Terminal Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
Saint Louis-San Francisco Railway Company
The Lake Superior Terminal & Transfer Railway Company
The Longview Switching Company
The Minnesota Transfer Railway Company
The Paducah & Illinois Railroad Company
The Portland Terminal Railroad Company
The St. Paul Union Depot Company
Southland Realty
The Terminal Railroad Association of St. Louis Company
Trailer Train Company

Western Fruit Express Company
The Wichita Union Terminal Railway Company
Winnona Bridge Railway Company
Northern Radial Limited

Burlington Northern is affiliated with the El Paso Company whose affiliates include:

El Paso Natural Gas Company
Bemm Holding Corporation
El Paso de Peru Company
El Paso Development Company

Ex-Mission Ranches, Inc.
Lake Country
Wind Jammer, Inc.

Adams Canyon Ranch
Santa Paula Farms

El Paso Gas Marketing Company
El Paso Hydrocarbons Company
El Paso Frontera Corporation
El Paso Gas Transportation Company
El Paso Hydrocarbons NGL Company
El Paso Hydrocarbons Pipeline Company
El Paso Hydrocarbons Service Company
El Paso Hydrocarbons Transportation Company
El Paso Storage Company
Minera San Pedro Corralitos, SA.
Odessa Natural Gasoline Company
Odessa Pipeline Company
Pecos Company
Trebol Drilling Company
El Paso Moave Pipeline Company
El Paso Natural Gas Building Company
El Paso Natural Gas Clearinghouse Company
Maridean Petroleum Holding, Inc.
Maridean Oil Production, Inc. (formerly El Paso Exploration, Inc.) EPX Company

Maridean Oil, Inc. (formerly Milestone Petroleum Inc.)
Butte Pipeline Company
Northern Rockies Pipeline
Maridean Oil Trading, Inc.
Portal Pipeline Company
Maridean Oil Pipeline, Inc.

No. 86-857

In The
Supreme Court of the United States
October Term, 1986

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

ROMESH GULATI,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

MICHAEL D. DOSHAN
DOSHAN & LORD
801 East Lake Street
Wayzata, MN 55391
(612) 475-2800

MICHAEL L. WEINER*
DePARCQ, HUNEGS,
RUDQUIST & KOENIG, P.A.
608 Building, Suite 565
608 Second Avenue South
Minneapolis, MN 55402
(612) 339-4511

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Minnesota Supreme Court properly held that respondent's state law claim for intentional infliction of emotional distress, based upon repeated outrageous acts by the railroad, was not preempted by the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.*

2. Whether the Minnesota Supreme Court properly held that respondent's state law claim, based upon outrageous acts intended to cause him emotional distress, was not preempted by the Federal Employers' Liability Act, 45 U.S.C. §§ 51, *et seq.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

No. 86-857

In The

Supreme Court of the United States

October Term, 1986

BURLINGTON NORTHERN RAILROAD COMPANY,

Petitioner,

v.

ROMESH GULATI,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

Respondent Romesh Gulati respectfully submits this brief in opposition to petitioner Burlington Northern Railroad Company's Petition for a Writ of Certiorari to review the decision of the Minnesota Supreme Court.

STATEMENT

With one important exception, respondent Romesh Gulati does not take issue with petitioner Burlington Northern's Statement of the Case. The Burlington Northern correctly notes respondent's allegations that it subjected him to constant and conspicuous surveillance and harassment, trumped-up disciplinary charges, breaking into his work locker, racial slurs and threats to "get him," and other repeated instances of outrageous behavior (allegations which must be taken as true for the purpose of this Petition), but the Burlington Northern then incorrectly states that respondent filed his state lawsuit "[*r*]*ather* than seek[ing] *relief* for this alleged misconduct through the administrative machinery created by . . . the RLA." (Petition, p. 5) (emphasis added)

The problem with the Burlington Northern's characterization of respondent's actions is that the Railway Labor Act ("RLA") 45 U.S.C. §§ 151, *et seq.* does ***not*** provide *any remedy* for the harm suffered from this misconduct, i.e. plaintiff's emotional distress. There is no provision in the RLA, nor in the collective bargaining agreement between the Burlington Northern and respondent, that permits respondent to make a claim for his emotional distress resulting from the repeated outrageous acts outlined above. The only relief this administrative process would be capable of providing to respondent is the return of his job, and respondent is in no way, shape or form seeking return of his job, or, for that matter, any other type of relief available under the administrative procedures of the RLA or his collective bargaining agreement. The harm suffered by respondent from these repeated intentional acts was *not*

the loss of his job, but severe emotional distress, and his *sole* claim before the Minnesota Supreme Court was, and remains, one for the emotional distress intentionally and knowingly inflicted upon him by the Burlington Northern.

———o———

REASONS FOR DENYING THE WRIT

Contrary to the Burlington Northern's claim, the Minnesota Supreme Court's decision is in complete harmony with the decisions of this Court, as well as with the various federal courts[1] and state courts[2] that have ruled on these issues. The Minnesota Supreme Court's decision does not, as the Burlington Northern would have this Court believe, permit railroad employees to evade the RLA for claims that are properly within the RLA's scope. By providing a remedy *not available* under the RLA to the few railroad employees who can meet the extremely high threshold of a Minnesota claim for intentional infliction of emotional distress, the Minnesota Supreme Court prevented railroads from taking unfair advantage of *a gap* in federal railroad laws, within which they could otherwise intentionally cause emotional harm to their employees without fear of liability. There is thus no need for this Court to review a state law

---

[1] See, *Lewis v. Louisville & Nashville R.R. Co.*, 758 F.2d 219 (7th Cir. 1985); *Tello v. Soo Line R.R. Co.*, 772 F.2d 458 (8th Cir. 1985); and *Balzeit v. Southern Pacific Transportation Co.*, 569 F.Supp. 986 (N.D. Cal. 1983).

[2] See, *DeTomaso v. Pan American World Airways, Inc.*, 174 Cal.App.3d 1170 (Cal. App. 1985), *appeal pending*, 714 P. 2d 1239 (1986); *Hanson v. City of Tacoma*, 719 P.2d 104 (Wash. 1986).

decision that is *fully consistent* with federal railroad laws, and which in fact *aids* the administration of these laws by eliminating as a source of conflict between railroads and their employees an entire area where railroads could otherwise wrongfully act against their employees *with impunity*.

The alleged conflict with federal railroad laws of which the Burlington Northern strenuously complains is, in reality, a false conflict. A close examination of the Minnesota Supreme Court's reasoned and well researched opinion reveals that the Minnesota Supreme Court considered each and every argument petitioner makes here, and rejected these arguments on the basis of this Court's decisions. As the following analysis will show, there is thus no need for this Court to reconsider what the Minnesota Supreme Court has already stated so well.

The broad issues here are, of course, based upon the preemption doctrine. The Minnesota Supreme Court first correctly noted that the preemption of state law by federal statutes or regulations is "not favored" (App., 8a)[3], (quoting *Chicago and Northwestern Transportation Co. v. Kalo Brick and Tile Co.*, 450 U.S. 311, 317 (1981)), and then discussed the three types of cases in which preemption applies. To summarize the Minnesota Supreme Court's analysis, preemption may be explicit,[4] implicit in the federal scheme.[5], or may arise where the state law conflicts with or is an obstacle to the accomplishment of the pur-

---

[3] App. refers to Petitioner's Appendix.

[4] Citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

[5] Citing *Fidelity Federal Savings & Loan Association v. De la Cuesta*, 458 U.S. 141, 153 (1982); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

poses of the federal scheme.[6] (App., 9a) The focus is immediately narrowed here because neither the RLA or the FELA explicitly preempts respondent's state law claim. The focus must then turn to the questions of, first, implicit preemption and second, whether the state law conflicts with or is an obstacle to the federal scheme. This analysis must begin with an examination of the state law claim in question.

A. Minnesota's Cause of Action for Intentional Infliction of Emotional Distress.

The State of Minnesota has long considered the protection of its citizens from emotional abuse and harm to be a strong state interest, the Minnesota Supreme Court stating here that:

> Minnesota has a strong interest in protecting its citizens from outrageous emotional abuse because the emotional health and well-being of its citizens is vital, not only to a stable economy, but to a civilized culture. (App., 19a)

Minnesota has long permitted recovery for emotional distress, holding that a schoolgirl could recover damages for mental suffering resulting from false accusations of unchastity and threats of imprisonment. *Johnson v. Sampson*, 167 Minn. 203, 208 N.W. 814 (1926). Indeed, an early commentator noted that Minnesota "has taken the lead in this field." Note, *Torts-Intentional Infliction of Mental Suffering—A New Tort*, 22 Minn. L. Rev. 1030, 1038 (1938). In 1963, Minnesota law had evolved to the point that damages for mental anguish or suffering were re-

---

[6] Citing *Florida Lime & Avocado Growers*, 373 U.S. at 142-43; *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

coverable under two circumstances, either accompanying a physical injury or where the defendant's conduct constituted a "direct invasion of the plaintiff's rights such as that constituting slander, libel, malicious prosecution, seduction, or other like willful, wanton, or malicious misconduct." *State Farm Mutual Automobile Insurance Company v. Village of Isle,* 265 Minn. 360, 122 N.W.2d 36, 41 (1963).

In 1983, Minnesota joined the majority of jurisdictions that explicitly recognized the tort of intentional infliction of emotional distress. *Hubbard v. United Press International, Inc.,* 330 N.W.2d 428 (Minn. 1983). In *Hubbard,* the Minnesota Supreme Court adopted the definition of intentional infliction of emotional distress set forth in *Restatement (Second) of Torts* § 46(1) (1965). The elements of this state law claim were set forth as follows:

> (1) The conduct must be extreme and outrageous;
>
> (2) The conduct must be intentional or reckless;
>
> (3) It must cause emotional distress; and
>
> (4) The distress must be severe. 330 N.W.2d at 438-39.

Two important points also follow from the Minnesota Supreme Court's adoption of this tort in *Hubbard.* First, the Minnesota Supreme Court narrowly defined the conduct this tort was to make actionable as that "so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community." 330 N.W.2d at 439 (quoting *Haagenson v. National Farmers Union Property and Casualty Co.,* 277 N.W.2d 648, 652-53 n.3

(Minn. 1979)). Second, the Minnesota Supreme Court was very careful to limit the scope of this cause of action, holding that a "complainant must sustain a . . . heavy burden of production in his allegations regarding the severity of his mental distress," 330 N.W.2d at 439. Emphasizing *both* of these restrictions, the court reasoned:

> In explaining both the extreme nature of the conduct necessary to invoke this tort, and the necessary degree of severity of the consequent mental distress, the Restatement's commentary emphasizes *the limited scope of this cause of action*, and clearly reflects a strong policy to prevent fictitious and speculative claims. Because this policy has long been a central feature of Minnesota law on the availability of damages for mental distress, our adoption of the Restatement formulation as the standard for the independent tort of intentional infliction of emotional distress does not signal an appreciable expansion in the scope of conduct actionable under this theory of recovery. The operation of this tort is *sharply limited* to cases involving *particularly egregious facts*. (footnote omitted) 330 N.W.2d at 439 (emphasis added).

Consequently, when undertaking our examination of the RLA and the FELA, the extremely limited nature and scope of this state law claim is a paramount consideration.

B. The Railway Labor Act

As recognized by the Minnesota Supreme Court, the Burlington Northern's argument that the RLA implicitly preempts respondent's state law claim fails because it runs squarely afoul of this Court's decisions. The Burlington Northern's claim of implicit preemption, stripped to its essence, is that the employee-employer relationship *mandates* the jurisdiction of the RLA, even if the wrongful

conduct has *nothing* to do with ordinary working conditions or matters covered by the collective bargaining agreement, and in spite of the fact that the RLA provides *no remedy* for any emotional harm. In case after case, this Court has rejected this broad claim of preemption, both under the RLA, *Terminal Railroad Assoc. of St. Louis v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943), and *Brotherhood of Locomotive Engineers v. Baltimore & Ohio R.R. Co.*, 372 U.S. 284 (1963); and under the similar goals, objectives, and principles of the National Labor Relations Act, 29 U.S.C. §§ 151, *et seq*, *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25*, 430 U.S. 290 (1977).

The RLA is indeed mandatory for "minor disputes,"[7] and courts have repeatedly held that a railroad employee cannot transform a true minor dispute (such as a wrongful discharge claim) into a state tort action merely by claiming emotional distress from the conduct making up the minor dispute. See *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984) (railway employee's claim of retaliatory discharge preempted by RLA); *Choate v. Louisville & Nashville R.R. Co.*, 715 F.2d 369 (7th Cir. 1983) (railroad employee's claim that the railroad wrongfully discharged him and failed to reinstate him is a minor dispute under the RLA); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir. 1978); *cert. denied*, 439 U.S. 930 (1978) (railroad

---

[7] This Court has defined minor disputes under the RLA as "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation, generally involving only one employee." *Brotherhood of Railroad Trainmen v. Chicago River and Indiana R.R. Co.*, 353 U.S. 30, 33 (1957).

employee's claim of wrongful discharge preempted by RLA). *See also, Beers v. Southern Pacific Transportation Co.*, 703 F.2d 425 (9th Cir. 1983) where the claim was not for wrongful discharge, but instead concerned the railroad's particular disciplinary procedures.[8]

These cases, so heavily relied upon by the Burlington Northern for its claim that respondent's intentional infliction of emotional distress claim is preempted by the RLA, in fact stand for nothing more than the common sense proposition that where *the essence* of the wrongful conduct complained of concerns a true minor dispute such as a wrongful discharge, the RLA applies. Respondent's

---

[8] The employee in *Beers v. Southern Pacific Transportation Co.* was a union local chairman who was fired on an insubordination charge because he engaged in "heated words" and name-calling with the supervisor at a hearing where he represented another employee. After he was fired, the employee filed a wrongful discharge claim with the National Railroad Adjustment Board (under the RLA) and sued his intentional infliction of emotional distress claim in state court. The state court action was removed to federal district court, where summary judgment was granted to the railroad on the basis that all of the employee's complaints arose out of the collective bargaining agreement, and thus were minor disputes under the RLA. The employee's *only* claims of intentional infliction of emotional distress arose out of the railroad's particular disciplinary procedures regarding two *other* engineers in his union, who the employee represented in his capacity as a union local chairman; and that he "received a run-around" over his complaints regarding working conditions. 703 F.2d at 427-28. The employee's complaints in *Beers* were thus not only nothing more than those ordinarily expected in the workplace, over conditions and particular disciplinary procedures, but more importantly, there was not a single allegation in *Beers* of the type of outrageous conduct alleged here, i.e. that rising to the level of "so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community." *Hubbard v. United Press International, Inc.*, 330 N.W.2d at 439.

allegations here that Burlington Northern officials, among other things, rifled his private locker, forged his time card in an unsuccessful attempt to get him fired, subjected him to harassing surveillance and racial epithets, referred to him as "[t]hat stinking Arab," and threatened that "[w]e will get that S.O.B." (App., 31a), obviously have no connection to a wrongful dispute claim, or, for that matter, any other possible subject of a grievance under the collective bargaining agreement. To the contrary, this is wrongful conduct that unquestionably meets the strict *Hubbard* standard as that "so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community." 330 N.W.2d at 439.

As recognized by the Minnesota Supreme Court (App., 14a-15a), this Court has repeatedly held that the RLA is not all-encompassing of *every* matter concerning working conditions. *See, Terminal Railroad Assoc. of St. Louis v. Brotherhood of Railroad Trainmen,* 318 U.S. 1, 6-7 (1943) (where this Court held that the RLA did not preclude the State of Illinois from enforcing a state safety requirement that cabooses be attached to all trains operating within the state); and *Brotherhood of Locomotive Engineers v. Baltimore & Ohio R.R. Co.,* 372 U.S. 284, 289-90 (1963) where it was held that the RLA does not regulate "wages, hours, or working conditions;" but only that which forms a true minor dispute, i.e. that stemming "from differing interpretations of the collective-bargaining agreement." *Andrews v. Louisville & Nashville R.R. Co.,* 406 U.S. 320, 324 (1972).

Thus, the Congressional scheme of the RLA does not implicitly preempt respondent's state law claim, a claim

which does not arise out of the collective bargaining agreement and which is not a minor dispute. The next step is to determine whether this state law claim *conflicts with* or is an *obstacle to* the accomplishment of the purposes of the RLA.

The fallacy of the railroads claim that the Minnesota Supreme Court's decision "conflicts with the decisions of this Court" (Petition, 10) is most evident when examing this Court's decision in *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25,* 430 U.S. 290 (1977). The plaintiff in *Farmer* was a carpenter and elected union official. Because of a disagreement between he and other union officials over various internal union policies, the union began to discriminate against him in referrals to employers from the hiring hall, and additionally subjected him to a "campaign of personal abuse and harassment." 430 U.S. 292. The plaintiff filed a state court action against his union, alleging both the discrimination in the union's hiring hall practices (which was also a breach of the applicable collective bargaining agreement) and the union's intentional infliction of emotional distress. The trial court sustained a demurrer to both the hiring hall discrimination and breach of contract claims on the basis of federal preemption, and allowed the intentional infliction of emotional distress claim to go to trial. The jury found in favor of the plaintiff, 430 U.S. at 294, but on appeal, the California Court of Appeals reversed. Following the California Supreme Court's denial of review, this Court granted certiorari solely to consider the application of the preemption doctrine to the plaintiff's intentional infliction of emotional distress claim. 430 U.S. at 294-95.

In resolving this question, this Court first recognized the "two competing interests" that shaped the preemption doctrine in labor law. *Id.* at 295. On the one hand, Congress' intent to make federal labor laws uniform implied that potentially conflicting state laws and remedies "cannot be permitted to operate." On the other hand, because Congress refrained from providing "specific directions with respect to the scope of preempted state regulation," the court noted that it had been "unwilling to 'declare preempted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers and unions . . .'" 430 U.S. at 295-96.

The Court further noted that it had previously refused to apply the preemption doctrine to various activities that might otherwise appear to fall within its scope. These prior decisions included activity that "was merely a peripheral concern" of the federal labor law, or "touched interests *so deeply rooted in local feelings and responsibility* that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the states of the power to act." 430 U.S. at 296-97 (emphasis added). Finally, this Court pointed out that it had refused to apply the preemption doctrine "where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes." 430 U.S. at 297.

Essentially, then, the preemption doctrine stated by this Court in *Farmer* requires (as recognized by the Min-

nesota Supreme Court, (App., 16a)) a balancing of the state interest in regulating the conduct in question with the potential for interference with the federal scheme. *Farmer,* 430 U.S. at 300.

Turning to the particular facts of the case before it, this Court in *Farmer* recognized the State of California's "substantial interest in protecting its citizens from the kind of abuse of which [the plaintiff] complained," i.e. "outrageous conduct, threats, intimidation, and words" which caused him to suffer "grievous mental and emotional distress as well as great physical damage." 430 U.S. at 301-302.

Balancing this state interest's potential for interference with federal regulation, the Court found a *complete absence* of any federal labor law protection for the plaintiff from this conduct "so outrageous that 'no reasonable man in a civilized society should be expected to endure it.' " 430 U.S. at 302. While the plaintiff could bring his discrimination or breach of contract claim before the National Labor Relations Board:

> Whether the statements or conduct of the respondents also caused [the plaintiff] severe emotional distress and physical injury would play *no role* in the Board's disposition of the case, and *the Board could not award [the plaintiff] damages for pain, suffering, or medical expenses.* 430 U.S. at 304. (emphasis added)

Exactly as in *Farmer,* respondent has no remedy under the RLA for the railroad's intentional infliction of emotional distress. The Railroad Adjustment Board could not award money damages, nor do respondent's allegations have anything to do with interpreting the party's

collective bargaining agreement, the exclusive focus of an adjustment board. The focus of the state court action, on the other hand, is on the elements of the tort under state law, a determination that may be made "without resolution of the 'merits' of the underlying labor dispute," if any. *Farmer*, 430 U.S. at 304.

In an excellent example of a case where the railroad employee's intentional infliction of emotional distress claim was based upon truly outrageous conduct separate and apart from a connection to a wrongful discharge, the California federal court in *Balzeit v. Southern Pacific Transportation Co.*, 569 F.Supp. 986, 989 (N.D. Cal. 1983) recognized that this Court's analysis in *Farmer* squarely applied.

> [N]either the RLA nor the collective bargaining agreement involved herein protects against the alleged outrageous conduct involved in Balzeit's Second and Third Causes of Action [based on the condition that he discharge his FELA attorney]. While Southern Pacific directs this court's attention to several provisions of the collective bargaining agreement governing the relationship between it and Balzeit's union . . . *nothing in such Agreement deals directly with, or provides a remedy for, the harm which Balzeit suffered* when Southern Pacific allegedly required that he dismiss his attorney as a condition to his reinstatement. (emphasis added)

The *Balzeit* court recognized that the merits of the employee's claims would only "peripherally concern itself with the merits of the underlying labor dispute," 569 F.Supp. at 989, and because the employee sought *only damages* from the railroad, there was "virtually no chance that [the employee's] state court action would conflict

with the administrative mechanism provided for under the RLA." *Id.* at 989-90.

Seeking the only escape possible from the dictates of this Court in *Farmer*, the Burlington Northern has argued throughout that the National Labor Relations Act in *Farmer* is somehow less comprehensive than the RLA, apparently on the theory that only the RLA statutorily requires that employment disputes be arbitrated. However, when courts such as in *Jackson v. Consolidated Rail Corp., supra*, 717 F.2d at 1052, make this comparison, they are referring only to the original provisions of the NRLA that date back to the Wagner Act and create a regulatory scheme administered by the National Labor Relations Board. The *entire* NLRA includes the amendments of the Taft-Hartley Act of 1947, particularly Sect. 301, 29 U.S.C. § 185, which is just as much a part of the NLRA as those parts enforced by the National Labor Relations Board. In the case of more than 90 percent of collective bargaining agreements, the *contract* establishes a grievance and arbitration remedy that is *exclusive*, exactly as with the arbitration remedy established by the RLA. See, *Allis-Chalmers Corp v. Lueck*, — U.S. —, 105 S.Ct. 1904, 1915-1916 (1985)[9].

---

[9] The Minnesota Supreme Court, in reaching this conclusion, pointed out Judge Posner's analysis of the issue in *Jackson v. Consolidated Rail Corp.*, 717 F.2d at 1060 (J. Posner, concurring in part and dissenting in part) where Judge Posner wrote "it might be different if Congress had established an administrative agency to police tort or tort-like conduct in railroad employment, but it has not; it has contented itself with requiring arbitration of contract disputes." The Minnesota Supreme Court noted that requiring arbitration of railway contract disputes is not unlike the limited scope of the NLRA's dispute-resolution process. (App., 16a, n.6)

C. The Federal Employers' Liability Act.

In arguing that the Minnesota Supreme Court's decision is "in conflict with decisions of this Court and that of several circuits," on preemption by the FELA (Petition, 16) the Burlington Northern once again is simply wrong. A close examination of petitioner's authorities on this question reveals that it has not cited *a single case* where a railroad employee sought damages for the railroad's intentional infliction of emotional distress. The Burlington Northern's reliance on *New York Central and Hudson R.R. v. Tonsellito,* 244 U.S. 360 (1917) and *Janelle v. Seaboard Coastline R.R.,* 524 F.2d 1259 (5th Cir. 1975), is completely misplaced because each case involved a claim for *personal injuries or death* resulting from a railroad's *negligence.* This Court in Tonsellito merely held that the injured 17-year-old railroad employee's *father* lost his common law right to claim his son's medical expenses and the loss of his son's services. In *Janelle,* the decendent railroad employee's spouse, after taking a FELA case to trial in which the jury found no negligence on the railroad, brought a state wrongful death claim for the same accident. In neither case was *intentional* and *outrageous* conduct of the railroad at issue, nor were these courts concerned with a claim for *emotional* distress.

As pointed out by the Minnesota Supreme Court, § 1 of the FELA, 45 U.S.C. § 51 (1982) speaks only to "negligence," and "neither the express language of the FELA nor its interpretation by federal courts covers" an intentional infliction of emotional distress claim for "purely emotional injuries." (App., 20a-21a) The Minnesota Supreme Court also pointed the well-established principle in the various circuits that, as stated by the Seventh

Circuit Court of Appeals: "[T]he FELA does not reach torts which work their harm through *nonphysical* means . . ." *Lancaster v. Norfolk and Western Railway Co.*, 773 F.2d 807, 815 (7th Cir. 1985) (emphasis added) (App., 21a)[10]

Rather than conflicting with established law, the Minnesota Supreme Court's opinion is in fact *in full conformity* with a number of federal circuits which have held infliction of emotional distress actions to be *independent* of any claim under the FELA. *See, Lewis v. Louisville & Nashville R.R. Co.*, 758 F.2d 219, 221-22 (7th Cir. 1985), where the court held that the employee's intimidation claim "alleged a different wrong and involved a different set of facts than the FELA claims;" and *Tello v. Soo Line R.R. Co.*, 772 F.2d 458, 461 (8th Cir. 1985), where the court noted that a railroad employee's claim of intentional infliction of emotional distress was a "state law claim."

Using the *Farmer* balancing test, the Minnesota Supreme Court recognized here that respondent's state law action may present "some" potential for interference, but that this interference was minimized by the sharp limitations and high thresholds of the state law claim. (App., 24a) Balanced against this potential for interference was Minnesota's "substantial interest in protecting its citizens from the type of harm that constitutes the intentional infliction of emotional distress," (App., 25a). Balancing the

---

[10] See also, e.g. *Bullard v. Central Vermont Railway, Inc.*, 565 F.2d 193 (1st Cir. 1977); *McSorley v. Consolidated Rail Corp.*, 581 F.Supp. 642 (S.D.N.Y. 1984); *Cales v. Chesapeake & Ohio Railway Co.*, 300 F.Supp. 155 (W.D. Va. 1969); Annot., 8 A.L.R. 3d 442 (1966 & Supp. 1985).

State of Minnesota's substantial interest against this minimal potential for interference, the Minnesota Supreme Court properly held that the FELA does not preempt respondent's state law claim. (*Id.*)

D. Effect of This Court's Consideration of The Atchison, T. and S.F. Ry. v. Buell, No. 85-1140.

The Burlington Northern has asked this Court to "hold this case pending a decision in *Buell* or review this case as well." (Petition, 11) An examination of the issues under review by this Court in *Buell*, as well as the Minnesota Supreme Court's *explicit nonreliance* on the decision of the Ninth Circuit Court of Appeals in *Buell*, reveals that neither action is warranted. The Ninth Circuit's opinion in *Buell v. Atchison, T. S.F. Ry. Co.*, 771 F.2d 1320 (9th Cir. 1985), *cert. granted*, 106 S.Ct. 1946 (1986), dealt solely with a relationship between two federal statutes, the FELA and the RLA. There was no state law claim of any kind in *Buell*, much less one of the extremely limited nature at issue here. Most important, the Ninth Circuit's holding in *Buell* clearly stated its limitation to cases traditionally subject to the FELA, i.e. those resulting from a railroad's *negligence*. As held by the Seventh Circuit:

> We hold that where an employee has suffered an injury *attributable to employer negligence*, the injury is compensable under the FELA regardless of its characterization as mental or physical. 771 F.2d at 1324. (emphasis added)

Consequently, while this Court's ruling in *Buell* will clarify the extent to which railroad employees may claim emotional damages resulting from a railroad's negligence, it will have no bearing on the issues presented here.

Equally important, this Court's decision in *Buell* will have no bearing on the Minnesota Supreme Court's rationale or basis for its conclusion, as the Minnesota court explicitly disclaimed any reliance on *Buell*. In fact, the Minnesota Supreme Court expressly noted that the Ninth Circuit's holding in *Buell* was "very much in the minority" and that *Buell* dealt only with "*negligent* acts on the part of co-employees." (App., 21a, n.7)

———o———

CONCLUSION

The Petition for a Writ of Certiorari to review the judgment of the Minnesota Supreme Court should be denied, and petitioner's request that the Court hold this case pending its decision in *Buell* should similarly be denied.

Respectfully submitted,

MICHAEL D. DOSHAN
DOSHAN & LORD
801 East Lake Street
Wayzata, MN 55391
(612) 475-2800

MICHAEL L. WEINER*
DePARCQ, HUNEGS,
RUDQUIST & KOENIG, P.A.
608 Building, Suite 565
608 Second Avenue South
Minneapolis, MN 55402
(612) 339-4511

* Counsel of Record

(3)

No. 86-857

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,
v.
ROMESH GULATI,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

MOTION OF THE NATIONAL RAILWAY LABOR CONFERENCE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

I. MICHAEL GREENBERGER
(Counsel of Record)
THOMAS J. MIKULA
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

DAVID P. LEE
General Counsel
NATIONAL RAILWAY
LABOR CONFERENCE
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7218
Counsel for *Amicus Curiae*

Dated: December 24, 1986

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-857

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

ROMESH GULATI,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

---

MOTION OF THE NATIONAL RAILWAY LABOR CONFERENCE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

The National Railway Labor Conference hereby moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*, in support of the petition for a writ of certiorari.[1]

Virtually all the nation's Class I railroads are members of the Conference. The Conference represents its member

---

[1] Pursuant to Rule 36(1) of this Court, the Conference has requested the parties' consent to the filing of the attached brief as *amicus curiae*. A letter indicating that the petitioner has consented has been filed with the Clerk of this Court. The respondent, however, declined to consent to the filing of this brief, thus necessitating this motion.

railroads both in national collective bargaining with unions pursuant to the Railway Labor Act and in regard to other labor-management relations problems that are of concern to the railroads generally. In addition, the Conference serves as a clearinghouse for information regarding, and renders assistance and advice to member railroads concerning, the mandatory system of administrative remedies established by the Railway Labor Act for settling disputes arising out of workplace grievances.

In recent years many of the Conference's members have been named as defendants in lawsuits by their employees seeking to resolve grievances that arise out of the employment relationship. Instead of seeking relief for these grievances through the mandatory system of administrative remedies created by the Railway Labor Act, these employees have sought relief under state law, principally tort law. The claim involved in this case for intentional infliction of emotional distress arising from an alleged pattern of harassment from supervisors and co-workers, is typical of these efforts to circumvent the grievance process. A majority of the state and federal courts that have faced the question of whether these cases can go forward have held that the Railway Labor Act preempts these claims. Some courts, however, have allowed railroad employees to avoid the Railway Labor Act's mandatory scheme of administrative remedies by pleading employment grievances in the form of state law claims. Because of this conflict, the Conference's members are subject to inconsistent rules on whether the Railway Labor Act provides the exclusive means by which employment disputes can be resolved.

That system for resolving employment disputes is critical to peaceful labor-management relations in the railroad industry. The Conference thus has a vital interest in ensuring that the procedures established by the Railway Labor Act are not undercut or circumvented, and asserts that the majority position on the preemption ques-

tion is correct. For this reason, and because the Conference believes its analysis of the conflict in the state and federal courts over the preemption issue may assist this Court in considering whether to grant a writ of certiorari in this case, the Conference seeks leave to file the accompanying brief as *amicus curiae* in support of the petition for certiorari.

Respectfully submitted,

I. MICHAEL GREENBERGER
(Counsel of Record)
THOMAS J. MIKULA
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

DAVID P. LEE
General Counsel
NATIONAL RAILWAY
LABOR CONFERENCE
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7218
Counsel for *Amicus Curiae*

Dated: December 24, 1986

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-857

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

ROMESH GULATI,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

---

BRIEF OF THE NATIONAL RAILWAY LABOR CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

INTEREST OF *AMICUS CURIAE*

The interest of the *amicus* is set forth in the accompanying motion for leave to file this brief.

ARGUMENT

This case presents the important question of the extent to which the Railway Labor Act preempts state law claims filed by railroad and airline employees seeking to resolve in state and federal courts disputes arising out of their employment. We show below that through the Railway Labor Act, Congress created administrative bodies known as adjustment boards with exclusive jurisdiction over employment disputes in the railroad and airline indus-

tries. That exclusive administrative system is critical to peaceful labor-management relations in the railroad and airline industries. We show further that in recent years a severe conflict has developed in the state and federal courts over the extent to which the Railway Labor Act allows employment disputes to be adjudicated in the state and federal courts under state law. While a majority of the courts that have considered the question has held correctly that the Railway Labor Act, with its mandatory system of administrative remedies, preempts state law claims arising out of employment disputes, a growing number of courts, including the one below, have allowed railroad and airline employees to circumvent this exclusive system and resolve their employment disputes by filing state law claims in state and federal courts. We respectfully urge therefore that certiorari be granted in this case to resolve this conflict.

A. The Railway Labor Act Creates Exclusive Jurisdiction For Resolving Employment Disputes In Adjustment Boards.

The Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, ("RLA"), establishes an exclusive and comprehensive system of federal remedies for resolving disputes in the railroad and airline industries between employees and employers. Under § 2(5) and § 3 First of the RLA, all "disputes . . . growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions," must be submitted for final and binding resolution to the National Railroad Adjustment Board. 45 U.S.C. §§ 151a(5), 153 First.[1]

---

[1] The National Railroad Adjustment Board ("NRAB") is a permanent federal administrative board comprising four divisions having jurisdiction over particular classes of railroad employees. 45 U.S.C. § 153 First (i). Section 3 Second of the Act authorizes the establishment of special boards of adjustment to decide disputes otherwise referable to the NRAB. 45 U.S.C. § 153 Second.

While Section 3 of the Act is not directly applicable to the airline industry, 45 U.S.C. § 182, Section 204 of the Act provides for the

These disputes, which are called "minor disputes" under the RLA, include not only controversies that involve the express terms of applicable collective bargaining agreements, but also claims "founded upon some incident of the employment relation . . . independent of these covered by the collective agreement." *Elgin, Joliet & Eastern Ry.* v. *Burley*, 325 U.S. 711, 723 (1945).

Congress's purpose in establishing this exclusive system for resolving disputes was to create "expert administrative board[s]" familiar with the "specialized technical nature" of industry custom and practice and railroad and airline collective bargaining agreements. *Pennsylvania R.R.* v. *Day*, 360 U.S. 548, 551, 553 (1959). As this Court has observed, " 'The railroad world is like a state within a state. Its population . . . has its own customs and its own vocabulary, and lives according to rules of its own making.' " *Whitehouse* v. *Illinois Central R.R.*, 349 U.S. 366, 371 (1955) (quoting Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567, 568-69 (1937)). By creating an administrative body to resolve all disputes arising out of the employment relationship, Congress hoped to provide for a uniform, orderly, and expert application of federal remedies to workplace controversies, as a means of preventing inconsistent resolution of disputes from leading to labor unrest that could interrupt the nation's transportation system. *Day*, 360 U.S. at 551-53; *Slocum* v. *Delaware, Lackawanna & Western R.R.*, 339 U.S. 239, 243 (1950).

The exclusivity of this scheme of administrative remedies results in "a denial of power in any court—state

---

establishment of adjustment boards to decide similar disputes in that industry. 45 U.S.C. § 184. See generally *International Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682 (1963). Employers and employees subject to the Railway Labor Act are exempt from the coverage of the National Labor Relations Act. See 29 U.S.C. § 152(2)-(3).

as well as federal—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act." *Slocum*, 339 U.S. at 244. Congress "considered it essential" to keep railroad and airline employee grievances "within the Adjustment Board[s] and out of the courts." *Union Pacific R.R.* v. *Sheehan*, 439 U.S. 89, 94 (1978). Accordingly, this Court has held that a railroad employee may not avoid submitting an employment dispute to an adjustment board by filing a claim for relief under state law in state or federal court. *Andrews* v. *Louisville & Nashville R.R.*, 406 U.S. 320, 325 (1972); *Day*, 360 U.S. at 552. The consequences of failing to preserve the exclusivity of this system is readily seen by considering the vast number of disputes affected. The railroad and airline industries currently employ over 900,000 persons, and more than 180,000 grievances are presented annually to the 12 major carriers in the railroad industry alone.[2] If even a small percentage of these hundreds of thousands of grievances were allowed to evade the RLA's scheme of administrative relief by being brought as state or federal court actions, the result would be a major influx of new litigation.

B. The State and Federal Courts Are In Severe Conflict Over The Scope Of Preemption Under The Railway Labor Act.

1. In the past several years, increasing numbers of employees in the railroad and airline industries have sought to circumvent the RLA's exclusive and comprehensive administrative process by pleading their employment grievances in the form of state law claims in the state and federal courts. This effort has led to a severe

---

[2] See Bureau of Labor Statistics, U.S. Dep't of Labor, *Employment and Earnings*, Jan. 1986 at 186 (922,000 persons employed in railroad and air transportation industries on average during 1985); *Amicus* Brief for Association of American Railroads and National Association of Railroad Trial Counsel at 7 & n.6, *Atchison, Topeka & Santa Fe Ry.* v. *Buell*, No. 85-1140 (petition granted May 5, 1986).

conflict in the state and federal courts over the extent to which the RLA preempts state law claims arising out of employment disputes in the railroad and airline industries. In most instances, these employees have been unsuccessful in their efforts, as most of the courts have given a broad preemptive effective to the RLA. See, *e.g.*, *Stephens* v. *Norfolk & Western Ry.*, 792 F.2d 576 (6th Cir. 1986); *Lanfried* v. *Terminal R.R. Ass'n*, 721 F.2d 254 (8th Cir. 1983), *cert. denied*, 466 U.S. 928 (1984); *Jackson* v. *Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *Magnuson* v. *Burlington Northern R.R.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978); *Koehler* v. *Illinois Central Gulf R.R.*, 488 N.E.2d 542 (Ill. 1985), *cert. denied*, 106 S. Ct. 3297 (1986). These courts have been faithful to Congress's design in enacting the RLA and have declined to allow railroad and airline employees to recast their grievances arising out of the employment relationship in terms of state law claims such as the intentional infliction of emotional distress, retaliatory discharge, and slander. See, *e.g.*, *Jackson*, 717 F.2d 1045 (retaliatory discharge); *Choate* v. *Louisville & Nashville R.R.*, 715 F.2d 369 (7th Cir. 1983) (intentional infliction of emotional distress); *Magnuson*, 576 F.2d 1367 (same); *Carson* v. *Southern Ry.*, 494 F. Supp. 1104 (D.S.C. 1979) (slander); *Koehler*, 488 N.E.2d 542 (retaliatory discharge). Instead, these courts have ruled that a plaintiff can not use "[a]rtful pleading" to disguise a minor dispute in the form of a state law claim, *Magnuson*, 576 F.2d at 1369, and that the RLA preempts such claims because that statute creates a comprehensive remedial scheme of administrative remedies for resolving employment grievances.

Recently, however, some courts, including the court below, have given a more narrow reading to the preemptive scope of the RLA. See, *e.g.*, *Gulati* v. *Burlington Northern R.R.*, 390 N.W.2d 743 (Minn. 1986), *petition for cert. pending*, No. 86-857; *Hanson* v. *City of Tacoma*,

719 P.2d 104 (Wash. 1986); *DeTomaso* v. *Pan American World Airways*, 220 Cal. Rptr. 493 (Cal. Ct. App. 1985), *review pending*, 714 P.2d 1239 (1986); *Wiley* v. *Missouri Pacific R.R.*, 430 So. 2d 1016 (La. Ct. App. 1982), *writ denied*, 431 So. 2d 1055 (1983); *Raybourn* v. *Burlington Northern R.R.*, 602 F. Supp. 385 (W.D. Mo. 1985); *Balzeit* v. *Southern Pacific Transp. Co.*, 569 F. Supp. 986 (N.D. Cal. 1983). These courts have allowed railroad and airline employees to avoid the RLA's mandatory scheme of administrative remedies by pleading employment grievances in the form of state law claims for unlawful discharge or discipline, *Hanson*, 719 P.2d 104; *Wiley*, 430 So.2d 1016, intentional infliction of emotional distress, *Gulati*, 390 N.W.2d 743; *Balzeit*, 569 F. Supp. 986, and defamation, *DeTomaso*, 220 Cal. Rptr. 493; *Rosemond* v. *National Railroad Passenger Corp.*, No. 85 Civ. 5661 (S.D.N.Y. Sept. 18, 1986) (unpublished order). The conflict that has developed prompted Judge Posner of the Seventh Circuit to write that "the case law on the displacement of [state] tort law by the Railway Labor Act is in disarray." *Jackson*, 717 F.2d at 1061 (dissenting opinion).

The majority rule is illustrated by *Beers* v. *Southern Pacific Transp. Co.*, 703 F.2d 425 (9th Cir. 1983), in which a railroad employee filed a state tort claim for intentional infliction of emotional distress that arose out of a confrontation with a supervisor during an investigatory hearing at which the employee was representing a co-worker. The employee was fired for insubordination because of the confrontation, but he was reinstated following a hearing before an adjustment board. The railroad argued that the employee's claim was preempted by the RLA, and the trial court agreed. On appeal, the Ninth Circuit observed that adjudication of the employee's state tort claim would have required an "interpretation and examination of the collective bargaining agreement resulting in state intervention into the area of fed-

eral labor law," because the employee's complaints related to work conditions, disciplinary procedures, and representation rights. 703 F.2d at 429. Accordingly, the court held that the state tort claim was preempted and affirmed the dismissal of the case.

The contrary approach found in the body of case law allowing state law claims to go forward, notwithstanding the preemptive effect of the RLA, is seen in the decision by the court below. *Gulati* v. *Burlington Northern R.R.*, 390 N.W.2d 743 (Minn. 1986). *Gulati* arose when a railroad employee filed suit against the railroad alleging, *inter alia*, that the railroad intentionally inflicted emotional distress upon him through a pattern of harassment by supervisors and co-workers, which culminated in his dismissal from the railroad. This lawsuit was brought in spite of the fact that the employee's dismissal was processed under the RLA's grievance procedures and was affirmed by an adjustment board. The railroad moved to dismiss this claim on the ground that the RLA preempted this state tort action because adjustment boards have exclusive jurisdiction over such workplace disputes. The trial court denied the motion to dismiss, but agreed to certify the question to the Minnesota Court of Appeals, which affirmed. *Gulati* v. *Burlington Northern R.R.*, 364 N.W.2d 446 (Minn. Ct. App. 1985).

The Minnesota Supreme Court granted a petition for further review and affirmed the ruling that the employee's state tort claim was not preempted by the RLA.[3] The court reasoned that "minor disputes" under the RLA are limited to those "matter[s] within the parameters of a collective-bargaining agreement," 390 N.W.2d at 750, and that an employee's claim for emotional dis-

---

[3] The court also held that the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.*, which provides a cause of action for damages to railroad employees suffering work-related injuries because of negligence attributable to their employer, did not preempt plaintiff's state law claim. 390 N.W.2d at 755.

tress "result[ing] from a continual pattern of harassment is not a minor dispute" but "is premised on the tort-law principle" that protects against atrocious and intolerable conduct. *Id.* In addition, the court relied heavily upon this Court's decision in *Farmer* v. *United Brotherhood of Carpenters & Joiners*, 430 U.S. 290 (1977), which held that the National Labor Relations Act did not preempt a union member's claim for intentional infliction of emotional distress against his union. Although *Farmer* involved a different federal statute, the Minnesota Supreme Court concluded that *Farmer* was equally applicable in the RLA context, and that the balance between state and federal interests, as envisioned by *Farmer*, favored allowing the employee to pursue his tort claim in state court. 390 N.W.2d at 751-753 & n.6.

2. As the above examples indicate, the growing conflict over the scope of RLA preemption involves sharply divergent positions on two questions. The first question is the scope of "minor disputes" under the Railway Labor Act. Courts holding that the RLA preempts state law claims generally have observed that all employment grievances must be submitted to adjustment boards for resolution, consistent with the broad definition of a minor dispute used in *Elgin, Joliet & Eastern Ry.* v. *Burley*, 325 U.S. 711 (1945), in which this Court defined minor disputes as covering claims under the collective bargaining agreement or those "founded upon some incident of the employment relation . . . *independent* of those covered by the collective [bargaining] agreement." *Id.* at 723 (emphasis added). See also, *e.g.*, *Magnuson*, 576 F.2d at 1369 (minor disputes are those that are "arguably governed" by or "inextricably intertwined with the grievance machinery of the collective bargaining agreement."); *Majors* v. *U.S. Air*, 525 F. Supp. 853, 856 (D. Md. 1981) (citing *Magnuson*). This broad definition follows from the RLA itself, which provides "for the prompt and orderly settlement of *all* disputes growing out of grievances *or* out of the interpretation or application of agreements

covering rates of pay, rules, or working conditions." 45 U.S.C. § 151a(5) (emphasis added).[4] In addition, courts holding that state law claims are preempted have paid heed to this Court's teachings in *Andrews* v. *Louisville & Nashville R.R.*, 406 U.S. 320 (1972), wherein this Court cautioned that a railroad employee cannot avoid submitting a minor dispute to an adjustment board by framing the dispute as a state law claim. 406 U.S. at 323-24. See also, *e.g.*, *Magnuson*, 576 F.2d at 1369 ("[a]rtful pleading" cannot disguise the fact that claim is a minor dispute); *Koehler*, 488 N.E.2d at 546 ("Stripped to its essentials, plaintiff's suit is a reformulation in tort of his grievance which . . . fell within the purview of the RLA.")

In the past several years, however, some courts have allowed state law claims to go forward on the basis of a more restrictive definition of "minor dispute," limited to only those complaints where the "source of [the] right" is the collective bargaining agreement, *Hanson*, 719 P.2d at 108, or where the "four corners of the collective bargaining agreement" are involved, *Gulati*, 390 N.W.2d at 750. And, instead of following this Court's lead in *Andrews* and carefully scrutinizing state law claims to determine whether they belong before an adjustment board, these courts have allowed the claims to go forward as being "legally independent" of any grievances for an adjustment board. *DeTomaso*, 220 Cal. Rptr. at 497; *Raybourn*, 602 F. Supp. at 387.

---

[4] Indeed, the breadth of this definition is confirmed by adjustment board decisions holding that the type of conduct that is the subject of complaint in this case, harassment from fellow-workers and supervisors, gives rise to a "minor dispute" reviewable by an adjustment board. *E.g.*, NRAB Third Division Award No. 25533 (June 28, 1985) (finding jurisdiction over claim of harassment from supervisor but holding that claim was time-barred and procedurally defective); NRAB First Division Award No. 13574 (May 12, 1950) (claim initiated by employees alleging that co-worker threatened them with bodily harm and physical violence).

3. Even when the question of whether a "minor dispute" is involved is not at issue, a second question that is further dividing the courts is the application of *Farmer* v. *United Brotherhood of Carpenters & Joiners*, 430 U.S. 290 (1977), a narrow decision in which this Court held that the National Labor Relations Act ("NLRA") did not preempt a union member's state tort claim against his union for intentional infliction of emotional distress. The *Farmer* Court based its decision on the absence of any provision of the NLRA protecting against the "outrageous conduct" that is necessary to prevail on a state tort claim for emotional distress, and the state's substantial interest in protecting its citizens against such abuse. The Court pointed out, however, that because of the federal interests involved, certain conduct that is regulated by the NLRA could not be the subject of a tort claim for emotional distress, even though the conduct might cause considerable emotional distress. *Id.* at 303-06.

Courts that have held correctly that the RLA preempts state law claims have observed that the differences between the NLRA (which merely protects and prohibits certain conduct) and the RLA (which provides a comprehensive scheme of remedies for employment grievances) warrant against uncritical application of the *Farmer* exception for NLRA preemption to cases involving preemption under the RLA.[5] These courts have reasoned that because the RLA creates a comprehensive scheme for redressing employment disputes, "preemp-

---

[5] Under the NLRA employees and unions voluntarily may agree to arbitrate disputes arising over the interpretation and application of collective bargaining agreements, and the federal courts have jurisdiction to enforce such arbitration agreements. *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). There is no general or mandatory statutory procedure, however, for resolving these contractual disputes or other grievances which do not rise to the level of prohibited unfair labor practices within the jurisdiction of the National Labor Relations Board.

tion of state law claims under the RLA [is] more complete" than preemption under the NLRA, *Peterson* v. *Airline Pilots Ass'n International*, 759 F.2d 1161, 1169 (4th Cir.), *cert. denied*, 106 S. Ct. 312 (1985), as it is more likely that allowing a state law action to go forward will "threaten undue interference with the federal regulatory scheme." *Koehler*, 488 N.E.2d at 545 (quoting *Farmer* v. *United Brotherhood of Carpenters & Joiners*, 430 U.S. 290, 302 (1977)).

In contrast, those courts that have allowed state law claims to proceed have applied the *Farmer* exception for NLRA preemption without alteration to preemption under the RLA. Ignoring the fundamental differences in the structure of the two statutes on this issue, these courts have observed that it is permissible to "refer to the NLRA . . . for assistance in construing the RLA," *Balzeit*, 569 F. Supp. at 988 n.5, or that the RLA's remedial scheme "is not unlike the limited scope of the NLRA's dispute resolution process." *Gulati*, 390 N.W.2d at 751 n.6.

4. This growing dispute has left the lower courts in a state of confusion on the question of RLA preemption, and the principle at issue in these cases is of considerable importance for three reasons. First, the inconsistent decisions threaten to undermine the goals of uniformity and stability that led Congress to enact the RLA. As stated previously, Congress created the mandatory and exclusive system of administrative remedies envisioned by the RLA to bring stability to the railroad industry by ensuring the uniform application of federal remedies. See, *e.g.*, *Pennsylvania R.R.* v. *Day*, 360 U.S. at 551-53; *Slocum* v. *Delaware, Lackawanna & Western R.R.*, 339 U.S. at 243. As a result of the considerable confusion over the scope of preemption under the RLA, many disputes formerely handled in a uniform fashion by adjustment boards are now being brought in the state and federal courts, contrary to Congress's intent. Moreover, because these courts lack the familiarity with the practices and

collective bargaining agreements unique to the railroad and airline industries, it is likely that similar disputes will be resolved in an inconsistent fashion. And because of the vast number of employees in the railroad and airline industries, state and federal courts may be inundated with claims normally processed by adjustment boards until this conflict is resolved. Indeed, the flood of lawsuits involving these issues has already begun, as evidenced in part by the number of reported decisions on this question in the past several years.

Second, the importance of this question is underscored by the interstate nature of the industries subject to the RLA. The railroad industry operates in 49 states and the airline industry operates in all 50 states, with most individual carriers operating in more than one state. As a result of the varying rulings on the scope of RLA preemption, a railroad or airline employee in one jurisdiction will be required to file a grievance with the adjustment board, while another employee of the same carrier in a different jurisdiction will have the option of bringing a court action to resolve an identical dispute.

Finally, on December 1, 1986, this Court heard oral argument in *Atchison, Topeka & Santa Fe Ry.* v. *Buell*, No. 85-1140 (petition granted May 5, 1986). The issue in *Buell* is whether a railroad employee's allegation of purely psychological harm resulting from a pattern of workplace harassment states a claim for relief under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq.*, or whether such a claim is a minor dispute subject to the remedial provisions of the RLA. Although this case and *Buell* arose from similar facts, the cases differ in that resolution of *Buell* will require this Court to examine carefully the relationship between two federal statutes, the FELA and the RLA, and to determine the extent to which claims by railroad employees must be asserted under one or the other statute. The issue in this case, however, is the question of the extent to which the RLA preempts state law claims arising out of em-

ployment grievances. While this preemption question presented here is not directly at issue in *Buell*, several parties filing briefs as *amici curiae* there pointed out that this question was related to *Buell* and urged that the issue was an important one. See *Amicus* Brief for Teamsters for a Democratic Union and Public Citizen at 3-7; *Amicus* Brief for National Railway Labor Conference at 27-30. An additional issue presented by this case, but not by *Buell*, is whether the FELA preempts state law claims by railroad employees seeking redress for emotional injury. See Petition for Writ of Certiorari at 16-18, *Burlington Northern R.R.* v. *Gulati*, No. 86-857.[6]

Once the Court defines the relationship between the RLA and the FELA in *Buell*, by granting certiorari in this case the Court can then decide to what extent those same two federal statutes occupy the field for work-related injuries and grievances, to the exclusion of state law. This will allow the Court to decide once and for all whether railroad and airline employees must submit employment disputes to an adjustment board or whether there are other available vehicles for remedying these disputes.

In sum, we urge that this Court grant the writ of certiorari in this case in order to resolve the conflict in the state and federal courts that has surfaced in recent years over the preemptive scope of the RLA. Resolution of this conflict is essential to preserving the exclusivity of the scheme of administrative remedies created by the RLA for resolving employment disputes in the railroad and airline industries. Moreover, granting certiorari in this case will complement this Court's deliberations in *Buell* and will allow the Court to resolve issues that are closely related to but not presented by *Buell*.

---

[6] The Conference adopts the petitioner's argument that the Minnesota Supreme Court's decision that the FELA does not preempt claims for intentional infliction of emotional distress is in conflict with decisions of this Court and the courts of appeals for several circuits, Petition for Certiorari at 16-18, and urges that this is an additional reason for granting certiorari in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

I. MICHAEL GREENBERGER
(Counsel of Record)
THOMAS J. MIKULA
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

DAVID P. LEE
General Counsel
NATIONAL RAILWAY
LABOR CONFERENCE
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7218
Counsel for *Amicus Curiae*

Dated: December 24, 1986

No. 86-857

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

ROMESH GULATI,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

---

PETITIONER'S REPLY BRIEF

EDMUND W. BURKE
RICHARD J. SCHREIBER
RICHARD V. WICKA
BURLINGTON NORTHERN
RAILROAD COMPANY
3800 Continental Plaza
Ft. Worth, TX 76102

REX E. LEE *
RONALD S. FLAGG
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

Cases: Page

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-857

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

ROMESH GULATI,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

---

PETITIONER'S REPLY BRIEF

Respondent attempts at length to defend the merits of the Minnesota Supreme Court's decision. However, he generally does not, and cannot, deny the existence of a sharp conflict among the state and federal courts over the extent to which the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151, *et seq.*, preempts state law claims arising out of employment disputes in the railroad and airline industries. Nor can Respondent deny that the issue in conflict is of great significance. The National Railway Labor Conference has emphasized the critical nature of this issue to the railroad industry in its brief as *Amicus Curiae* in Support of the Petition in this case, and the Teamsters for a Democratic Union have indicated rail-

way labor's agreement with this conclusion.[1] The issue affects vital interests of railroad and airline employers and employees throughout the Nation, yet the outcome of disputes that raise the issue depends on the section of the country in which the suit is brought.

1. Respondent's primary argument is that the Minnesota Supreme Court's decision is in harmony with decisions of several federal and state courts. Res. Br. at 3. This argument is correct, but it cuts in favor of, rather than against, a grant of certiorari. The reason is that—contrary to the Minnesota Supreme Court's decision—an even greater number of federal and state courts have rejected attempts by railway and airline employees to circumvent the RLA's exclusive and comprehensive dispute resolution process by casting their employment grievances in the form of state law claims. *See* Cert. Pet. at 14-16. Indeed, at nearly the same time that the Minnesota Supreme Court was concluding that a railway employee could challenge the merits of disciplinary proceedings brought against him by means of a complaint under state law for intentional infliction of emotional distress, the court in *Stephens* v. *Norfolk and Western Ry.*, 792 F.2d 576, 579 (6th Cir. 1986), was rejecting a similar claim:

> "Employees' attempts to evade NRAB exclusive jurisdiction over minor disputes by recharacterizing their claims into state causes of action are scrutinized by the following test: If the 'action is based on a matrix of facts which are inextricably intertwined with the grievance machinery of the collec-

---

[1] *See* Brief for Teamsters for a Democratic Union and Public Citizen as *Amici Curiae* filed in *The Atchison, Topeka and Santa Fe Railway* v. *Buell*, No. 85-1140 at 7 (arguing that "case law on the displacement of [state] tort law by the Railway Labor Act" is in "disarray" and that this Court should not resolve that issue in *Buell* but "wait to address that question until it has been fully briefed and addressed by the parties in a case squarely presenting the issue").

> tive bargaining agreement and of the R.L.A.,' exclusive jurisdiction of the NRAB preempts the action. *Magnuson* v. *Burlington Northern, Inc.*, 576 F.2d 1367, 1369 (9th Cir. 1978), *cert. denied*, 439 U.S. 930, 99 S. Ct. 318, 58 L.Ed.2d 323 (1978). Pursuant to this standard, other circuits dismiss for lack of subject matter jurisdiction state court claims of reckless or intentional infliction of emotional distress arising directly out of a labor dispute. *See Beers* v. *Southern Pacific Transportation Co.*, 703 F.2d 425 (9th Cir. 1983); *Choate* v. *Louisville & Nashvlle Railroad Co.*, 715 F.2d 369 (7th Cir. 1983)."

Very simply, the approach and the holding in this case cannot be reconciled with the rule followed in other cases that "if the action is based on a matrix of facts which are inextricably intertwined with the grievance machinery of the collective bargaining agreement and of the RLA, exclusive jurisdiction of the NRAB preempts the action." [2] Significantly, Respondent does not even attempt such a reconciliation.

Respondent attempts to distinguish the cases cited by Petitioner by arguing that, unlike this case, they do not involve claims for intentional infliction of emotional distress for which the RLA allegedly provides no remedy. Respondents' claim is without merit for at least three reasons. First, at least four circuits have held that claims for intentional infliction of emotional distress are

---

[2] Respondent claims that his allegations in this case "have no connection to . . . any . . . possible subject of a grievance under the collective agreement." Res. Br. at 10. This contention is plainly erroneous. For example, Rule 35 of the collective bargaining agreement provides detailed procedures for "a fair and impartial investigation" in employee disciplinary proceedings. Pet. App. 48a-49a. Respondent's claim here that the disciplinary proceedings brought against him were improper is thus "inextricably intertwined with the grievance machinery of the collective bargaining agreement."

preempted by the RLA.[3] Second, contrary to Respondent's claim, the grievance procedures provided under the RLA do provide a remedy—although different from that available under state tort law—to an employee who claims to have been subject to a pattern of harassment by his supervisor or co-workers.[4] Third, and in any event, this Court has made clear that a state claim otherwise preempted under federal law is not revived by the fact that the remedies available under federal law differ in kind or scope from those potentially available under state law. *See Local 926, International Union of Operating Engineers, AFL, CIO* v. *Jones*, 460 U.S. 669, 684 (1983); *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 246-47 (1959).

2. Respondent also argues at length that the Minnesota Supreme Court's decision here is consistent with the decision in *Farmer* v. *United Brotherhood of Carpenters and Joiners of America, Local 25*, 430 U.S. 290 (1977), in which this Court held that the National

---

[3] *See, e.g., Adkins* v. *Chesapeake & O. Ry.*, No. 85-1204 (4th Cir., Oct. 3, 1985), *pet. for cert. pending*, No. 85-1099; *Antalek* v. *Norfolk and Western Ry.*, No. 84-3057 (6th Cir., Aug. 30, 1984); *Choate* v. *Louisville & N.R.R.*, 715 F.2d 369 (7th Cir. 1983); *Beers* v. *Southern Pacific Transp. Co.*, 703 F.2d 425 (9th Cir. 1983); *Magnuson* v. *Burlington Northern, Inc.*, 576 F.2d 1367, 1369 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978). The decisions in *Adkins* and *Antalek* are unpublished but were reproduced in the appendix to the Petition for a Writ of Certiorari in *The Atchison, Topeka and Santa Fe Railway* v. *Buell*, No. 85-1140.

[4] It is commonplace for adjustment boards to entertain claims by employees that they have been subject to harassment by their employers. *See, e.g., UTU* v. *Baltimore & Ohio R. Co.*, Award No. 360 (Public Law Board No. 1312, March 26, 1979) (stating that the union acting on behalf of its members "has heretofore successfully demonstrated that it is quite competent to handle grievances of proven harassment"); *BRAC* v. *Southern Pacific Transp. Co.*, Award No. 31 (Public Law Board No. 1946, July 8, 1980); *Brotherhood Railway Carmen* v. *Washington Terminal Co.*, Award No. 8481 (NRAB Second Div., October 29, 1980). *See also* cases cited in Brief of National Railway Labor Conference as *Amicus Curiae* at 9 n.4.

Labor Relations Act ("NLRA") did not preempt an employee's claim for intentional infliction of emotional distress against his union.[5] Res. Br. at 11-15. Respondent again, however, ignores the fact that, in applying *Farmer* to this case, the Minnesota Supreme Court's opinion conflicts with the decisions of numerous federal and state courts which have declined to apply the *Farmer* rationale to claims subject to RLA grievance procedures.[6] These courts have reasoned that because the RLA creates a comprehensive scheme for redressing employment disputes, "preemption of state law claims [under that Act is] more complete" than preemption under the NLRA (which merely protects and prohibits certain conduct). *Peterson* v. *Air Line Pilots Ass'n International*, 759 F.2d at 1169. Respondent does not, and cannot, deny that, in applying *Farmer* to this case, the Minnesota Supreme Court's opinion conflicts with these decisions. He simply ignores them.

3. Finally, Respondent argues that "the Minnesota Supreme Court's opinion is in fact *in full conformity* with a number of federal circuits which have held infliction of emotional distress to be *independent* of any claim under the FELA." Res. Br. at 17 (emphasis in original). This argument overlooks the two decisions relied upon by the dissenting justice in the decision below

---

[5] Because *Farmer* involved a claim by an employee against his union, that claim plainly was not covered by any arbitration clause of a collective bargaining agreement between the union and the employer, nor by a statute, such as the RLA, which imposes mandatory and comprehensive grievance resolution procedures.

[6] *See, e.g., Peterson* v. *Air Line Pilots Ass'n International*, 759 F.2d 1161, 1168-69 and n.18 (4th Cir.), *cert. denied*, 106 S. Ct. 312 (1985); *Jackson* v. *Consolidated Rail Corp.*, 717 F.2d 1045, 1051-54 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *Magnuson* v. *Burlington Northern, Inc.*, 576 F.2d 1367, 1369-70 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978); *Koehler* v. *Illinois Central Gulf R.R.*, 109 Ill. 2d 473, 488 N.E.2d 542, 545 (1985), *cert. denied*, 106 S. Ct 3297 (1986).

(Pet. App. 26a-27a), who, applying *Buell* v. *Atchison, Topeka & Santa Fe Railway Co.*, 771 F.2d 1320 (9th Cir. 1985), *cert. granted*, No. 85-1140, and *Lancaster* v. *Norfolk & Western Ry.*, 773 F.2d 807, 818 (7th Cir. 1985), *pet. for cert. pending*, 85-1702, concluded that Respondent's claims were preempted by the FELA. The majority of the Minnesota Supreme Court declined to follow the holding in *Buell* that a claim for infliction of emotional distress is cognizable under the FELA, finding "[s]uch a holding [to be] very much in the minority." Pet. App. 21a n.7. The decision below thus conflicts with *Buell* and, at a minimum, should be held pending resolution of that case by this Court.

CONCLUSION

The petition for a writ of certiorari to review the judgment of the Minnesota Supreme Court should be granted. Alternatively, the Court should retain this case on its docket pending decision on the merits of No. 85-1140.

Respectfully submitted,

EDMUND W. BURKE
RICHARD J. SCHREIBER
RICHARD V. WICKA
BURLINGTON NORTHERN
RAILROAD COMPANY
3800 Continental Plaza
Ft. Worth, TX 76102

REX E. LEE *
RONALD S. FLAGG
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

* Counsel of Record